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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BEHLES-GIDDENS, P.A., now known as
J.D. BEHLES & ASSOCIATES, P.C.,
Petitioner,

v.

ANGEL PROJECT I, LTD., and
UNITED STATES TRUSTEE,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Under Sections 328 (a) and 330 (a) of the Bankruptcy Code, may a bankruptcy judge reconsider the reasonableness of a fee arrangement previously approved unless and until the judge determines that the terms and conditions of the agreement were improvident?

A. What impact does Section 328 (a) of the Bankruptcy Code have on previously approved fee agreements that are later reconsidered by a bankruptcy judge?

B. Should have the United States Court of Appeals for the Tenth Circuit and the courts below analyzed Behles-Giddens' fee applications consistent with the terms of both Section 328 (a) and Section 330 (a) of the Bankruptcy Code, and approved the requested fees consistent with the terms of the approved employment Order?

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The March 1, 2000, Order of the United States Court of Appeals for the Tenth Circuit denying the Petitioner's Petition for Rehearing En Banc is reprinted in Appendix L to this Petition. The January 18, 2000, Opinion of the United States Court of Appeals for the Tenth Circuit was unpublished, but is available at 2000 U.S. App. LEXIS 615, and is reprinted in Appendix A to this Petition. The August 11, 1997, Judgment, Memorandum Opinion, and Order of the United States Bankruptcy Court for the District of New Mexico is reprinted in Appendix D to this Petition. The October 3, 1996, Order of the United States District Court for the District of New Mexico is reprinted in Appendix B to this Petition. The September 10, 1996, Proposed Analysis and Recommended Disposition of the Magistrate Judge of the United States District Court for the District of New Mexico is reprinted in Appendix C to this Petition. The prior Orders of the United States Bankruptcy Court for the District of New Mexico concerning the Petitioner's Applications for Compensation are reprinted in Appendices E, F, G, H, I, J, and K to this Petition.

JURISDICTION

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit were entered on January 18, 2000. The Order of the United States Court of Appeals for the Tenth Circuit denying the Petitioner's Petition for Rehearing En Banc was entered on March 1, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

This case involves the Bankruptcy Code, 11 U.S.C. § 328 (a), 11 U.S.C. § 330 (a) (1), 11 U.S.C. § 1102 (a) (2), 11 U.S.C. § 1103 (a), and 11 U.S.C. § 1103 (c) (1) - (5).

11 U.S.C. § 328 (a) provides:

> (a) The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

11 U.S.C. § 330 (a) (1) provides:

> (a) (1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103 –

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

11 U.S.C. § 1102 (a) (2) provides:

(a) (2) On request of a party in interest, the court may order the appointment of additional committees of creditors or of equity security holders if necessary to assure adequate representation of creditors or of equity holders. The United States trustee shall appoint any such committee.

11 U.S.C. § 1103 (a) provides:

(a) At a scheduled meeting of a committee appointed under section 1102 of this title, at which a majority of the members of such committee are present, and with the court's approval, such committee may select and authorize the employment by such committee of one or more attorneys, accountants, or other agents, to represent or perform services for such committee.

11 U.S.C. § 1103 (c) (1) - (5) provides:

(c) A committee appointed under section 1102 of this title may –

(1) consult with the trustee or debtor in possession concerning the administration of the case;

(2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;

(3) participate in the formulation of a plan, advise those represented by such committee of such committee's determinations as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;

(4) request the appointment of a trustee or examiner under section 1104 of this title; and

(5) perform such other duties as are in the interest of those represented.

STATEMENT OF THE CASE

The Petitioner's appeal arises out of its representation of the Property Owner's Committee in the Angel Fire Bankruptcies, In Re: Angel Fire Corporation, No. 11-93-12176, and the fees for which the Petitioner applied. In 1993, the Angel Fire Corporation (hereinafter referred to as the "Debtor") filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of New Mexico. The U.S. Trustee, pursuant to 11 U.S.C. § 1102 (a) (2), appointed a Property Owner's Committee ("POC"), which hired the Petitioner, Behles-Giddens, P.A. ("Behles-Giddens"), pursuant to 11 U.S.C. §§ 1103 (a) and 328 (a), on an hourly time and charges basis for legal services pertaining to the POC's claims against the bankruptcy estate.

All of the services performed by Behles-Giddens were done at the POC's request and were authorized by the language in 11 U.S.C. § 1103 (c). These services included (1) consulting with the U.S. Trustee and Debtor in Possession concerning case administration; (2) investigating the acts, conduct, assets, liabilities, and financial condition of the Debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan; (3) participating in the formation of a plan, advising property owners represented by the POC of the POC's determinations as to any such plan, and collecting and filing the POC's acceptances or rejections of proposed plans; (4) requesting the appointment of a trustee or examiner; and (5) performing such other services as were in the POC's interest. The court below later denied certain fees and costs, on the basis that the interests of certain members of the POC were not compensable as creditor claims performed on behalf of POC constituency, and were, thus, not subject to

compensation under Section 330 as "reasonable and necessary."

Procedurally, this case has been a long journey for the Petitioner. After a hearing on Behles-Giddens' second, third, and fourth Applications for Compensation, the Honorable Stewart Rose, United States Bankruptcy Judge for the District of New Mexico, awarded Behles-Giddens a total sum of $535,507.05 in attorney's fees, completely denying a substantial portion of the fees and costs earned under the Section 328 (a) fee agreement Order in the amount of $692,400.00. Behles-Giddens appealed the Order to the United States District Court for the District of New Mexico. The Honorable Richard L. Puglisi, United States Magistrate Judge, concluded that Judge Rose's factual findings were inadequate and that the legal basis used in his Order was indeterminable. Judge Puglisi ordered that the matter be remanded.

Upon remand to the United States Bankruptcy Court, the Honorable Roland J. Brumbaugh, United States Bankruptcy Judge, acting as successor to Judge Rose, reviewed a transcript of the earlier hearing, awarded Behles-Giddens the sum of $535,507.05, and prohibited Behles-Giddens from submitting any further applications for compensation.

Behles-Giddens appealed the matter to the United States District Court for the District of New Mexico, where the matter was assigned to the Honorable John Conway, United States Judge for the District of New Mexico, who referred the matter to Magistrate Judge Puglisi. Judge Puglisi recommended that Judge Brumbaugh's Memorandum opinion and Order be affirmed and Judge Conway adopted that recommendation.

Behles-Giddens appealed the matter to the United States Court of Appeals for the Tenth Circuit. In finding that Behles-Giddens raised no issue that warranted relief, the Tenth Circuit stated only that the amount awarded was "reasonable" under 11 U.S.C. § 330 (a) (1) (A). The Court failed to analyze Behles-Giddens' fee applications under both Sections 328 (a) and 330 (a) as is required by the very terms of Section 330 (a).

Under Section 328 (a), a committee, with the court's approval, may employ professional persons on any reasonable terms of employment, including hourly, and notwithstanding such approval, the court may allow compensation different from that provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been "improvident in light of developments not capable of being anticipated at the time of fixing such terms and conditions." Under Section 330 (a) (1), a bankruptcy court, subject to Section 328, may award an attorney employed under Section 1103 reasonable compensation for actual, necessary services rendered by the attorney. Under Section 328 (a), only after a showing that the terms and conditions of the agreement proved to be improvident in light of unforeseen developments may the court modify the terms and conditions of the compensation. In this matter, there were no unforeseen developments that made the terms and conditions of Behles-Giddens employment Order improvident.

REASONS FOR GRANTING THE WRIT

I. THE COURTS ARE DIVIDED ON THE QUESTION

Congress enacted the Bankruptcy Code in 1978, restructuring bankruptcy law and creating a uniform federal statutory structure for debtor relief. To make the compensation of bankruptcy attorneys commensurate with the fees awarded for comparable services in non-bankruptcy cases and to "not deter competent counsel from entering the bankruptcy area," Congress enacted Sections 328 and 330. Section 328 (a) provides the procedural mechanism by which Bankruptcy Courts authorize the terms of compensation at the time of the application for approval for employment, and it authorizes bankruptcy courts to pre-approve a wide variety of employment arrangements, including on retainer, on an hourly basis, or on a contingent fee basis. In a similar vein, Section 330 (a) provides the framework for review of a fee arrangement and states that compensation should be "reasonable." By its own terms, however, Section 330 (a) is "subject to" the limitations set forth in Section 328 (a), and the two sections work in tandem and must be read together. Thus, when the court has pre-approved the terms and conditions of employment under Section 328 (a), the reasonableness factors of Section 330 (a) cannot supplant Section 328 (a), and a judge cannot freely void a previously authorized fee arrangement unless the terms and conditions of the agreement "prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions."

Under this framework, the question presented by this case is a question of federal law involving Sections 328 (a) and 330 (a) of the Bankruptcy Code. Although there is a

paucity of case law in the federal courts specifically addressing this question, the United States Courts of Appeals and Bankruptcy Courts that have considered the issue have rendered decisions that deviate from the customary approach in federal courts that uses a Section 330 (a) lodestar and "reasonableness" analysis. *See, e.g., Boston & Maine Corp. v. Moore*, 776 F.2d 2, 6-7 (1st Cir. 1985).

To date, only two Circuit Courts of Appeals have directly considered in a published opinion how Sections 328 (a) and 330 (a) are to be applied in tandem to a fee arrangement that was previously approved by a bankruptcy court. The United States Courts of Appeals for the Fifth and the Ninth Circuits have held that when prior court approval is given to a certain fee agreement under Section 328 (a), a judge may not later modify the agreement under a Section 330 (a) reasonableness analysis unless the agreement proves to have been improvident in light of unforeseeable developments. *In Re: Reimers*, 972 F.2d 1127, 1129 (9th Cir. 1992); *Donaldson, Lufkin & Jenrette Sec. Corp. v. Nat'l Gypsum (In Re: National Gypsum Co.)*, 123 F.3d 861, 862 (5th Cir. 1997). In contrast, The United States Court of Appeals for the First Circuit adheres to the lodestar approach under Section 330 (a), irregardless of Section 328 (a), when reviewing applications for compensation. *Boston & Maine Corp. v. Moore*, 776 F.2d at 6-7.

To date, the United States Court of Appeals for the Tenth Circuit has not published an opinion that specifically addresses the proper analysis for an award of attorneys fees under Sections 328 (a) and 330 (a). However, in its unpublished Opinion below, the Tenth Circuit used exclusively a Section 330 (a) "reasonable, actual, and necessary" analysis, ignoring the facts that Behles-Giddens' fee arrangement with the POC was previously approved by

the Bankruptcy Court pursuant to Section 328 (a) and that no unanticipated events occurred that rendered improvident the terms and conditions of the agreement.

United States Bankruptcy Courts have similarly rendered differing opinions on the question of the impact of Section 328 (a) on pre-approved fee arrangements, with a minority of those Courts holding that Section 328 (a) requires the court to make a determination as to the reasonableness of a fee arrangement at the beginning of a case, not later under Section 330 (a). *In re Dividend Devel. Corp.*, 145 B.R. 651 (Bankr. C.D. Cal. 1992). Similarly, another court held that where a law firm sought and got court approval of a contingency fee agreement under Section 328 (a), Section 328 (a) was the applicable standard for reviewing pre-approved fee arrangements, not Section 330 (a). *In re Merry Go-Round Enter.*, 244 B.R. 327, 336 (Bankr. M.D. Md. 2000).

II. THE QUESTION PRESENTED IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE RESOLVED BY THIS COURT

The issue raised by this case is one that requires resolution by this Court for several reasons.

A. The Need for Uniformity in Application of the Bankruptcy Code

First, the opinions in the Fifth and Ninth Circuit Courts of Appeals leave unsettled the proper, uniform basis by which all Bankruptcy courts are to determine and award attorneys fees under Sections 328 (a) and 330 (a) of the Bankruptcy Code. This is an important question that should be resolved by this Court due to the need to ensure that competent counsel work in the area of bankruptcy law (124 CONG. REC. H11, 091-92 (daily ed. Sept. 28, 1978) *reprinted in* 1978 U.S.C.C.A.N. 6436, 6442) and due to the need for uniform application of the provisions of the Bankruptcy Code by the Federal Courts. *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369-70 (1945).

B. The Need for Resolution on how Bankruptcy Courts are to Uniformly Determine Attorney's Fees Under Sections 328 and 330

Second, the decision in the Tenth Circuit below, though unpublished, represents a conflict among the Circuit Courts of Appeals on how Sections 328 (a) and 330 (a) are to be appropriately applied in the awarding of attorney's fees.

The Fifth and Ninth Circuit Courts of Appeals have rendered opinions that give credence to the approach under Sections 328 (a) and 330 (a). Yet, in its Order and Judgment of January 18, 2000, the Tenth Circuit Court of Appeals summarily disposed of Behles-Giddens' request for review under Sections 328 (a) and 330 (a) without even a look at Section 328 (a).

This lack of uniform application across the Circuits exemplifies the confusion among the Bankruptcy Courts and practitioners regarding the tandem use of Sections 328 (a) and 330 (a), particularly at the time of the attorney's application for compensation. If attorneys are not assured of the certainty of their fee arrangements as Congress so intended, no competent counsel will undertake the estate work for fear that their previously-approved fee agreement will be later modified on the whim of the judge. Behles-Giddens respectfully requests this Court to make a determination on the tandem use of Sections 328 (a) and 330 (a) and to diminish the uncertainty that bankruptcy practitioners may otherwise face if Bankruptcy Courts continue to ignore the impact of Section 328 (a) on approved fee agreements.

C. Scholarly Commentary on the Matter Supports the View that Sections 328 (a) and 330 (a) are to be Used in Tandem in the Review and Awarding of Fees.

Third, legal commentary on the matter supports Behles-Giddens' position that an analysis under Sections 328 (a) and 330 (a) serves as the proper basis to review and award fees. What little there has been written on the subject points out the common misapprehension shared by bankruptcy

judges and practitioners that a court has the right, and even the duty, to re-examine the reasonableness of fees at the final fee hearing. *See* Leif M. Clark, *Survey Article: Bankruptcy*, 30 TEX. TECH L. REV. 441, 468 (1999) Another commentator has suggested that "many lawyers and judges do not understand, or even realize, the impact of Section 328 (a). . . . [t]here is great confusion regarding the impact of Section 328 (a), particularly at the time of the application for compensation." Landry & Higdon, *A Primer on 11 U.S.C. 328(a) and its use in Alternative Billing Methods in Bankruptcy*, 50 MERCER L. REV. 537, 539 (1999). One of the more noted commentators on Bankruptcy Law has noted that, although a court continues to retain the ultimate responsibility in ensuring that compensation falls within the parameters of Section 330, "[T]his does not mean that a court may conduct a reasonableness review of an approved fee arrangement." 2 LAWRENCE P. KING, COLLIER ON BANKRUPTCY, P 328.03[1] (15th ed. 1996) (citing *In re Dividend Development Corp.*, *supra*). In light the confusion in the Federal Circuits regarding the uniform applications of Sections 328 (a) and 330 (a), Behles-Giddens respectfully asks this Court to clarify how the two statutes are to be construed.

CONCLUSION

This case presents a question of importance to bankruptcy practitioners -- whether bankruptcy judges can reconsider the reasonableness of fee agreements that were already approved by the court pursuant to Section 328 (a) of the Bankruptcy Code. If the opinions below are allowed to stand, bankruptcy practitioners in the Federal Circuits where the tandem use of Sections 328 (a) and 330 (a) is not recognized will continue to work with the uncertainty that their approved fee agreements may be later modified on a judge's whim. The very terms of Section 330 (a) subject the

statute to the limitations set forth in Section 328. The Petitioner respectfully asks this Court to question how the courts below can interpret the Sections 328 (a) and 330 (a) any other way. In doing so, this Court can affirm the importance of uniformity in application of the Bankruptcy Code.

Accordingly, Behles-Giddens respectfully requests that this Petition for Writ of Certiorari be granted.

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed January 18, 2000]

No. 98-2198

BEHLES-GIDDENS, P.A., now known as J.D. BEHLES AND ASSOCIATES, P.C., *Appellant,*	)
v.	)
ANGEL PROJECT I, LTD., and UNITED STATES TRUSTEE, *Appellees.*	)

ORDER AND JUDGMENT*

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata and collateral estoppel. Citation of orders and judgment is generally disfavored; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Before **BRORBY** and **McWILLIAMS**, Circuit Judges, and **WEST**, District Judge[1]

Appellant Behles-Giddens, P.A. (Behles-Giddens), was employed pursuant to title 11, section 1103 of the United States Code as legal counsel for a property owners' committee appointed in a bankruptcy proceeding involving Angel Fire Corporation.[2] In re Angel Fire Corporation, No. 11-93-12176. As such, Behles-Giddens was required to have its fees and expenses approved by the bankruptcy court. 11 U.S.C. §§ 330(a)(1), 1103.

In an Order dated September 18, 1995, the Honorable Stewart Rose, United States Bankruptcy Judge for the District of New Mexico, after a hearing on Behles-Giddens' second, third and fourth Applications for Compensation, awarded Behles-Giddens the total sum of $535,507.05 in attorneys' fees. The Order was appealed to the district court and the matter was assigned to the Honorable Santiago E. Campos, United States District Court for the District of New Mexico, who referred it to United States Magistrate Judge Richard L. Puglisi.

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[1] The Honorable Lee R. West, Senior United States District Judge for the Western District of Oklahoma, sitting by designation.

[2] Although this bankruptcy proceeding was consolidated for administrative purposes with proceedings involving four wholly-owned subsidiaries, the property owners' committee was appointed only in the Angel Fire Corporation matter.

Magistrate Judge Puglisi deemed Judge Rose's factual findings inadequate and the legal basis used indeterminable and he recommended that the matter be remanded. Judge Campos adopted the recommended disposition and the matter was remanded to the bankruptcy court on October 3, 1996.

The case was eventually transferred to the Honorable Roland J. Brumbaugh, United States Bankruptcy Judge for the District of New Mexico, in June 1997. On August 11, 1997, Judge Brumbaugh, after reviewing a transcript of the earlier hearing, again awarded fees to Behles-Giddens in the amount of $535,507.05. He also prohibited Behles-Giddens from submitting any further applications for compensation. Behles-Giddens again appealed to the district court. The matter was assigned to the Honorable John Conway, United States District Judge for the District of New Mexico, who in turn referred the matter to Magistrate Judge Puglisi.

On June 22, 1998, Magistrate Judge Puglisi recommended that Judge Brumbaugh's Memorandum Opinion and Order be affirmed and on July 15, 1998, Judge Conway adopted that recommendation. This appeal followed.

Behles-Giddens has raised numerous issues on appeal. Having reviewed the factual findings made by Judge Brumbaugh under a "clearly erroneous" standard and having considered de novo the questions of law, e.g., Virginia Beach Federal Savings and Loan Ass'n v. Wood, 901 F.2d 849 (10th Cir. 1990), we find Behles-Giddens has raised no issue that warrants the relief requested.

Title 11, section 330 of the United States Code authorizes a bankruptcy court to award "reasonable

compensation for actual, necessary services. . . ." 11 U.S.C. § 330(a)(1)(A). "An element of whether the services were 'necessary' is whether they benefitted the bankruptcy estate." In re Lederman Enterprises, Inc., 997 F.2d 1321, 1323 (10th Cir. 1993) (citation omitted). A determination of whether the claimed services were actual and/or necessary is dispositive of the issues presented in this case.

Based upon our review of the record, we find the award of $535,507.05 is reasonable compensation for the actual and necessary services rendered by Behles-Giddens. Accordingly, we AFFIRM for substantially the same reasons set forth in Judge Brumbaugh's Memorandum Opinion and Order dated August 11, 1997, and Magistrate Judge Puglisi's Proposed Analysis and Recommended Disposition dated June 22, 1998, which were adopted and affirmed by Judge Conway on July 15, 1998.

Entered for the Court

/s/_____
Lee R. West
Senior District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

[Filed October 3, 1996]

No. CIV 95-1154 SC/RLP

BEHLES-GIDDENS, P.A., and THE PROPERTY OWNERS COMMITTEE,
Appellants,

v.

ANGEL FIRE CORPORATION, ANGEL FIRE SKI CORPORATION, SANGRE DE CRISTO LIMITED PARTNERSHIP I, SANGRE DE CRISTO LIMITED PARTNERSHIP II, SANGRE DE CRISTO LIMITED PARTNERSHIP IV, PARKER TOWN SQUARE, INC., ANGEL PROJECT I, LTD., BILL J. SHOLER, TRUSTEE, UNITED STATES TRUSTEE, and TICOR TITLE INSURANCE COMPANY,
Appellees.

ORDER ADOPTING MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDED DISPOSITION AND REVERSING THE DECISION OF THE BANKRUPTCY COURT

THIS MATTER came before the Court on the Magistrate Judge's Findings and Recommended Disposition, filed September 10, 1996, and on the limited objections to the proposed findings and recommended disposition filed by Appellees United States Trustee for the District of New Mexico and Angel Projects I, Ltd. The Court conducted a *de novo* review of those portions of the Magistrate Judge's findings and recommended disposition to which Appellees object.

IT IS HEREBY ORDERED that the findings and recommended disposition of the United States Magistrate Judge are adopted by the Court.

IT IS FURTHER ORDERED that the judgment of the Bankruptcy Court be, and hereby is, reversed, and this matter is remanded for further proceedings consistent with this Order.

/s/_____
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

[Filed September 10, 1996]

No. CIV 95-1154 SC/RLP

BEHLES-GIDDENS, P.A., and THE PROPERTY OWNERS COMMITTEE,
Appellants,

v.

ANGEL FIRE CORPORATION, ANGEL FIRE SKI CORPORATION, SANGRE DE CRISTO LIMITED PARTNERSHIP I, SANGRE DE CRISTO LIMITED PARTNERSHIP II, SANGRE DE CRISTO LIMITED PARTNERSHIP IV, PARKER TOWN SQUARE, INC., ANGEL PROJECT I, LTD., BILL J. SHOLER, TRUSTEE, UNITED STATES TRUSTEE, and TICOR TITLE INSURANCE COMPANY,
Appellees.

MAGISTRATE JUDGE'S PROPOSED ANALYSIS AND RECOMMENDED DISPOSITION

Proposed Findings

THIS MATTER is before the Court on appeal from the decision of the Bankruptcy Court denying the second, third, and fourth fee applications submitted by Behles-Giddens, P.A. Following a three-day evidentiary hearing, on July 31, 1995, the Bankruptcy Court ruled from the bench, approving $535,507.05 of the total amount requested. Behles-Giddens appeals from the Bankruptcy Court's Order of September 18, 1995, memorializing its oral ruling.

This dispute arises from the voluntary Chapter 11 bankruptcy proceedings initiated by Angel Fire Corporation (AFC), Angel Fire Ski Corporation (AFSC), Sangre de Cristo Limited Partnership I (Sangre I), Sangre de Cristo Limited Partnership II (Sangre II), and Sangre de Cristo Limited Partnership IV (Sangre IV) on July 9, 1993. AFC was a holding company, which along with its wholly-owned subsidiaries, AFSC, Sangre I, and Sangre II, operated the Angel Fire resort in northern New Mexico. Sangre IV, another wholly-owned subsidiary of AFC, owned and operated a hotel at the base of the Angel Fire ski area. The bankruptcy proceedings were consolidated for joint administration on October 27, 1993.

On September 21, 1993, the United States Trustee appointed a committee of property owners (POC) in the AFC proceeding, pursuant to 11 U.S.C. § 1102(a). This committee represented approximately 5,800 to 6,000 Angel Fire property owners. The POC pursued four main goals on behalf of the

property, owners: 1) to assure funding for future improvement to and operation of the water and sewer system for those who purchased property through escrow contracts; 2) to preserve their negative easement right to use resort amenities, including the ski area, golf course, and country club; 3) to insure their annual dues payments of approximately $1,500,000 were used in a manner consistent with their amenity rights; and 4) to protect claims of some 750 owners against HUD for infrastructure improvements.

The Bankruptcy Court approved the employment of Behles-Giddens as counsel for the POC on September 30, 1993. In its Order, the court also authorized the estate to pay Behles-Giddens 75% of billed attorneys' fees and 100% of billed costs on a monthly basis, with fee applications to be filed not less than every 180 days. Behles-Giddens filed its first application for compensation for the period from September 21, 1993, through January 31, 1994, on February 25, 1994, seeking attorneys' fees of $129,104.90, paraprofessional fees of $19,680.00, taxes of $8,648.87, and costs of $24,349.01, $81,825.28 of which had been paid previously. Following objections by five of the parties, Judge McFeeley held four hearings on the first application between April and September 1994 and entered four orders, ultimately approving all but $2,912.09 of the amount requested.

Behles-Giddens filed its second fee application on August 24, 1994, seeking attorneys' fees of $282,919.75, paraprofessional fees of $45,739.00, taxes of $19,018.44, and costs of $48,601.53, of which $280,386.68 had previously been paid. Numerous objections again were filed, including that of First National Bank of Santa Fe (FNBSF), which also requested that Behles-Giddens disgorge all fees previously

paid. On October 19, 1994, FNBSF filed a motion to amend the order of employment of Behles-Giddens and another request for an order of disgorgement of all fees previously paid. The Bankruptcy Court conducted a full evidentiary hearing on FNBSF's motion on December 13, 1994, and issued its order denying the motion to amend the order of employment and the request for an order of disgorgement on January 3, 1995.

At the hearing on the second fee application on January 25, 1995, Judge McFeeley directed Behles-Giddens to file its third fee application and continued the hearing until April 5, 1995, at which time a combined preliminary hearing was to be held on both the second and third applications. On February 16, 1995, however, Judge McFeeley recused himself from these bankruptcy proceedings and they were transferred to Judge Rose. Judge Rose subsequently deferred hearings on all fee applications until after holding the hearing on plan confirmation.

Behles-Giddens filed its third application for compensation on February 21, 1995, requesting attorneys' fees of $301,850.04, paraprofessional fees of $25,558.50, taxes of $19,030.03, and costs of $51,157.23, $282,976.63 of which had already been paid. Sometime in the spring of 1995 the Chapter 11 trustee apparently ceased making monthly payments to Behles-Giddens. Behles-Giddens filed its fourth and final fee application on June 21, 1995, seeking further attorneys' fees of $181,991.40, paraprofessional fees of $19,450.00, taxes totaling $11,708.71, and costs of $37,835.60, apparently none of which had been prepaid.

The Bankruptcy Court held the hearing on all fee applications from July 25 through July 31, 1995, at which time it considered Behles-Giddens' second, third, and fourth applications and the argument of the five objectors, AFC, Angel Project I, Ltd., Parker Town Square, Ticor Title Insurance Company and FNBSF, Trustee Bill J. Sholer, and the United States Trustee. Following its ruling from the bench on July 31, 1995, the Bankruptcy Court issued an order on September 18, 1995, awarding total, undifferentiated compensation of $535,507.05 to Behles-Giddens for the three applications and disallowing all other amounts requested. It is this order from which Appellants now appeal.

On appeal the District Court will reject the Bankruptcy Court's findings of fact only if clearly erroneous. *Broitman v. Kirkland (In re Kirkland),* 86 F.3d 172, 174 (10th Cir. 1996) (citing *In re Mama D'Angelo, Inc.,* 55 F.3d 552, 555 (10th Cir. 1995)); Fed. R. Bankr. P. 8013 ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses."). This Court will review conclusions of law, however, *de novo. Kirkland,* 86 F.3d at 174 (citing *In re Davidovich,* 901 F.2d 1533, 1536 (10th Cir. 1990)).

Among other issues on appeal, Appellants contend that the Bankruptcy Court's findings of fact are inadequate to allow this Court to review its decision. After having thoroughly reviewed the briefs of the parties and the transcript of the Bankruptcy Court's oral decision and having heard oral argument on September 3, 1996, the Court agrees. This Court additionally finds that it also is unable to determine the

legal basis employed by the Bankruptcy Court in reaching its decision. Therefore, this matter should be reversed and remanded to the Bankruptcy Court for entry of findings of fact and conclusions of law sufficient to allow meaningful review on appeal, if necessary. Given that the Bankruptcy Court has already entertained three days of testimony concerning this matter, no further proceedings would appear to be necessary. The parties to this appeal so agreed at oral argument.

This Court is mindful of its limited role in reviewing the Bankruptcy Court's award of attorneys' fees. *See e.g., Mares v. Credit Bureau of Raton,* 801 F.2d 1197, 1199-1200 (10th Cir. 1986), and cases cited therein. Recognizing that the Bankruptcy Court has discretion in awarding attorneys' fees, *Rubner & Kutner, P.C. v. U.S. Trustee (In re Lederman Enters.),* 997 F.2d 1321, 1323 (10th Cir. 1993), it should, however, "provide a concise but clear explanation of its reasons for the fee award," which gives an adequate basis for review, *Mares,* 801 F.2d at 1201 *(quoting Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983)). Thus, the Bankruptcy Court, applying the standards set forth in Section 330 of the Bankruptcy Code, 11 U.S.C. § 330, and the lodestar analysis set forth in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974), *First Nat't Bank of Lea County v. Niccum (In re Permian Anchor Servs.),* 649 F.2d 763, 768 (10th Cir. 1981), should issue an order setting forth its decision and the reasoning therefore with regard to its award of attorneys' fees in this matter. *Lederman,* 997 F.2d at 1323.

Recommended Disposition

That the Bankruptcy Court's Order be reversed and this matter be remanded. The Parties shall be given the opportunity to object as described in 28 U.S.C. § 636. Objections shall be filed within ten days of the date of entry of the Magistrate Judge's Proposed Findings and Recommended Disposition.

/s/_____
Richard L. Puglisi
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEW MEXICO

[Filed August 11, 1997]

No. 11-93-12176 RA

In re:	)
	)
ANGEL FIRE CORPORATION,	)
ANGEL FIRE SKI	)
CORPORATION, SANGRE	)
DE CRISTO LIMITED	)
PARTNERSHIP I, SANGRE	)
DE CRISTO LIMITED	)
PARTNERSHIP II, SANGRE	)
DE CRISTO LIMITED	)
PARTNERSHIP IV,	)
Debtors,	)
	)

JUDGMENT

Pursuant to and in accordance with the Order signed by the Honorable Roland J. Brumbaugh, United States Bankruptcy Judge, on August 11, 1997, it is

ORDERED that the Second, Third, and Fourth Applications for Compensation (Doc. # 637, 981, and 1311) by Behles-Giddens, P.A., are finally approved, and the

Applications are allowed in the amount of $535,507.05. It is

FURTHER ORDERED that any sums received by Behles-Giddens, P.A., from the estate in excess of the total amount allowed by this Order and upon the First Application shall be returned to the estate forthwith. It is

FURTHER ORDERED that no further applications for compensation from Behles-Giddens, P.A., as counsel for the Property Owners Committee, herein shall be considered by the Court.

Dated August 11, 1997

/s/_____
Jill Peterson, Deputy Clerk
United States Bankruptcy Court
421 Gold Avenue SW
Albuquerque, NM 87102

APPROVED AS TO FORM:

/s/_____
Roland J. Brumbaugh
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

[Filed August 11, 1997]

No. 11-93-12176 RA

In re:	)
	)
ANGEL FIRE CORPORATION,	)
ANGEL FIRE SKI	)
CORPORATION, SANGRE	)
DE CRISTO LIMITED	)
PARTNERSHIP I, SANGRE	)
DE CRISTO LIMITED	)
PARTNERSHIP II, SANGRE	)
DE CRISTO LIMITED	)
PARTNERSHIP IV,	)
Debtors,	)
	)

MEMORANDUM OPINION AND ORDER

THIS MATTER came on for hearing beginning July 26, 27, and 28, 1995, before the Honorable Stewart Rose. Closing arguments were heard on July 31, 1995. On September 18, 1995, Judge Rose entered his Order Regarding Second, Third, and Fourth Application for Compensation Filed by Counsel for the Property Owners Committee. That Order was appealed to the U.S. District Court for the District of New Mexico. In the fall of 1996 the matter was remanded to this Court for the entry of detailed findings and conclusions.

In March 1997 Judge Rose was injured in an accident and was not available. Thereafter, on June 12, 1996, Judge McFeeley of this Court transferred this case to the undersigned pursuant to Rule 63, Fed. R. Civ. P., and Rule 9028, Fed. R. Bankr. P. Subsequently the undesigned reviewed the case, including the transcript of the testimony and arguments for the July 1995 hearing and set a hearing upon notice to determine if any party deemed it necessary to recall any witness in the matter. That hearing was held July 28, 1997, and no parry desired to recall any witness. Therefore, the matter is ripe for decision.

The matters now before the Court are the 2nd, 3rd, and 4th, provisional and final applications for fees and expenses of counsel appointed for the Property Owners Committee ("POC"), Behles-Giddens, P.A. ("BG"). These applications cover the period from January 28, 1994, to June 21, 1995. The POC was appointed in the Angel Fire Corporation ("AFC") case, and not in any of the other cases now consolidated herein.

Angel Fire Resort is a real estate development that consists of several thousand subdivided residential lots. There is also a ski area, hotel, golf course and club house, recreational lakes, greenbelt areas, and a petting zoo. The rights to use these facilities by the owners of the lots who pay dues are referred to by the parties as the "amenities." Over 6000 of the lots have been sold and a major portion of those now have houses or cabins built on them. The dues paid by the lot owners amount to approximately $1.5 million per year. All of the undeveloped property and amenities were owned by AFC, except the hotel and ski area. The hotel was owned by a limited partnership and was worth no more than $2.0

million, but it was secured to Parker Town Square, a subsidiary of a Savings and Loan Association, for a debt of over $22.0 million. Although AFC was liable on the Parker debt, Parker held no security for the debt except the hotel. The ski area was owned by Angel Fire Ski Corporation ("AFSC"), which was a wholly owned subsidiary of AFC. The ski area was pledged to TICOR for a $2.2 million debt. The golf course club house was pledged to Francine Equities for a $0.6 million debt. These debts, along with some delinquent property taxes, were the major secured debts. There was no significant unsecured debt except for the claims of the owners of the lots.

These lot owners, or "property owners" professed two interests or claims: (1) to preserve their right to use the amenities (referred to by the parties as a "negative easement") and as a parallel thereto, to insure that the dues they paid were used in accordance with prior agreements, i.e., to preserve and maintain those amenities; and (2) the completion of the infrastructure improvements in the development such as water, sewer, roads, etc. Because the developers had not yet completed all of the infrastructure as required by the Interstate Land Sales Act, sales of the lots had ceased in the mid 1980s. These were referred to as the "HUD claims."

The property owners prevailed upon the U.S. Trustee to appoint the POC, but the record is devoid of any indication that the U.S. Trustee had any real discussion with the property owners selected regarding the nature of their claims as creditors, as distinguished from those of community residents or of amenities users.

After the POC was formed by the U.S. Trustee the POC interviewed several law firms and ultimately selected BG as it counsel. Minutes of the POC meetings of the interviews with BG reflect that no discussion of the nature of the claims of the members of POC against AFC was ever had. Testimony at the hearing indicated that no fee agreement between the POC and BG was ever discussed, and that the POC never believed that it had any obligation to pay the fees of BG.

Although BG divided its fee applications into 26 sub-categories of work performed, for purposes of the decision herein the Court will analyze the attorney fee applications in 5 main categories: (1) HUD claims; (2) dues structure and escrow funds; (3) plan participation; (4) dues supervision; and (5) litigation. In addition, the Court will consider the paraprofessional fees and expenses separately.

This analysis begins in looking at the original appointment of the committee. Appointment and appropriate composition of a committee are the obligations of the U.S. Trustee. 11 U.S.C. § 1102(a); *see, In re Drexel Burnham Lambert Group, Inc.*, 118 B.R. 209 (Bankr. S.D.N.Y. 1990). Because only unsecured creditors may serve on the committee, the U.S. Trustee must analyze the nature of the committee members' claims. *In re America West Airlines,* 142 B.P. 901 (Bankr. Ariz. 1992). As the court stated in *In re Grant Broadcasting of Philadelphia, Inc.*, 71 B.P. 655 at 661-62 (Bankr. E.D. Pa. 1987), ". . . it is important to make certain that they [committee members] are representative of *common* creditors' concerns." [Italics in original]. There is no evidence in the record that the U.S. Trustee informed the

POC members of any limitations on their activities as creditors of AFC.

Professional fees can be approved only for actual and necessary services and expenses and the fees must be reasonable. 11 U.S.C. § 330(a)(1); *In re Lederman Enterprises, Inc.*, 997 F.2d 1321. And the court can order the return of any interim fees received in excess of the final award. 11 U.S.C. § 330(a)(5).

Two of the three statutory requirements are at issue here. The first issue is whether the services and expenses are "actual," i.e., services were in fact performed and expenses incurred. *In re Orthopaedic Technology, Inc.*, 97 B.R. 596 (Bankr. Colo. 1989). The second issue is whether the services and expenses were "necessary." BG argues that "necessary" means the POC's objectives could not have been met but for the services performed, citing *In re Pettibone Corp.*, 74 B.R. 293 (Bankr. N.D. Ill. 1987), and *In re Lifschultz Fast Freight, Inc.*, 140 B.R. 482 (Bankr. N.D. Ill. 1992). The objectors cite *Lederman, supra*, 997 F.2d 1321, and *In re Stromberg*, 161 B.R. 510 (Bankr. Colo. 1993), asserting that a threshold inquiry is whether the services benefitted the estate, and that compensation from the estate is precluded if no benefit is shown.

Applicable case law indicates that the meaning of "necessary" in this context is a composite of the two positions. Even in the cases cited by BG, the "but for" analysis is circumscribed by the committee's capacity as creditors. The objectors' asserted "benefit" threshold, on the other hand, may be met simply by the committee's performance of allowable duties under 11 U.S.C. § 1103(c).

Fees for services of committee counsel, therefore, are compensable from the estate if the services convey a direct benefit to the estate or are necessary to the undertaking of a committee's allowable duties. In other words, "necessary" services benefit the estate by implication, *see Lederman, supra,* 997 F.2d at 1323 ("benefit" is an element of the "necessary" requirement) (citing *In re Dixon,* 143 B.R. 671 (Bankr. N.D. Tex. 1992) ("main inquiry under § 330 is whether . . . services were necessary and benefitted the estate")) [emphasis added], and no separate benefit must be shown if services are in pursuit of statutorily specified duties.

BG's view of "necessary" leads to the ". . . prominence to fee matters which causes some bankruptcy courts to be held in low esteem by many creditors, who perceive our Courts as servants of the interest of the bankruptcy bar rather than the interests of debtor and creditors." *In re Grant Broadcasting, supra,* 71 B.R. at 660. The actual meaning of "necessary" in this context inheres in the cross-check on professional fees found in the provisions of 11 U.S.C. §§ 101(5) and 1102(a)(1), which limit membership of a creditors committee to parties holding claims for payment. By this limitation, the ultimate dividend to unsecured creditors will necessarily be reduced by the fees paid to their counsel, and the committee and counsel must operate within the confines of this inverse ratio. *In re Gillett Holding, Inc.,* 137 B.R. 462 (Bankr. Colo. 1992). However, vociferousness of committee members and unflinching willingness of counsel to oblige are not grounds for awarding fees. *In re Pettibone, supra,* 74 B.R. 308; *In re Lederman, supra,* 997 F.2d 1321. Counsel are obligated to make judgments about the relevance of the work the principal calls

upon it to perform. *In re Kitchen Factors, Inc.*, 143 B.R. 560 (9th Cir. BAP 1992).

BG further argues that this committee was appointed as a property owners committee, even asserting in its opening statement that the owners were not creditors (Tr. at 22), as if to suggest the amended order approving its employment condones this hybrid composition of the committee. The apparent thrust of this argument is that, to the extent the conduct of the POC and counsel was not representative of creditors, such conduct was nonetheless pre-approved by the amended order of appointment, or that some sort of estoppel allows fees for all services on behalf of the committee, whether made up of creditors or not. The Court is obviously not-concerned with the name of the committee. *See In re Dow Corning Corp.*, 194 B.R. 121 (Bankr. E.D. Mich. 1996) ("Tort Claimants committee"). The amended order approving employment gives no indication that the committee, as an official committee under 11 U.S.C. § 1102, was authorized to act in a capacity other than as creditors. Nor is there any authority furnished for the proposition that an appointment order can override or displace statutory requirements. *See In re Dow Corning Corp.*, 199 B.R. 896 (Bankr. E.D. Mich. 1996) (Services must be "*within the bankruptcy case*") [italics in original].

Although argument and testimony at trial generally cast the dispute in terms of the requirement that fees must be reasonable, the objections are not actually directed at this element. Reasonableness is determined by formula after the Court has found the services and expenses are actual and necessary. *In re Lederman, supra,* 997 F.2d 1323. The measure of reasonableness is set forth in 11 U.S.C.

§ 330(a)(3) and in the twelve-factor "lodestar" calculation announced in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). The objectors do not contend that the amount of time spent by BG on necessary services, or the firm's hourly rates, were unreasonable in the circumstances. As discussed below, the objections are resolved by determining whether services and expenses were actual and necessary, not whether the fees charged were reasonable.

The applicant has the burden of proof in obtaining approval of its fees. *Mares v. Credit Bureau of Raton,* 801 F.2d 1197 (10th Cir. 1986); *In re Pettibone, supra,* 74 B.R. 293. If this burden is not met, the Court may deny the application in whole or in part and is not obligated to parse the application or rule on each item. *Mares, supra,* 801 F.2d 1197; *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc.,* 924 F.2d 955 (9th Cir. 1991). "[T]he court's most careful labor must be concentrated on adjustments to claimed hours." *Mares, supra,* 801 F.2d at 1201, and its findings should be adequate to support its ruling. *Hensley v. Eckerhart,* 461 U.S. 424 (1983). The conduct of the committee and counsel are examined under the above standards.

Attorney Fees

The owners' HUD claims for unfinished infrastructure work were the plainest sort of contract claims against the debtor AFC and were resolved in the consensual plan. The property owners were clearly acting as creditors in asserting these damages claims for breach of contractual promises by the developer/debtor. The objectors, on the other hand, elicited testimony to the effect that the POC was not

concerned with the HUD claims and that BG's efforts in resolving these claims ultimately worked to the detriment of the property owners and to the financial advantage of the plan funder. No testimony to that effect, however, was elicited from the POC, and given the committee's active participation throughout the case, the Court does not find that BG acted adversely to its client's interests. Because no showing was made that the resolution of HUD claims was detrimental to the estate, and because a mutually agreeable resolution of these claims likely precludes future litigation, the Court concludes that a reasonable fee for these services is compensable from the estate.

The efforts of BG and the POC in encouraging the property owners to continue to pay their dues, in negotiating a modified dues structure, and in locating and preserving an account of escrowed funds clearly benefitted the AFC estate. Early on in the case, the debtor-in-possession had filed a motion to assume, for one year, the amenities-use agreements as executory contracts, and later the POC believed that the agreements would be breached by the Trustee's proposed plan of reorganization. It does not appear that there had been any breach of the agreements, either pre-petition or post-petition, which could have given rise to claims by property owners.[1] Such a breach or rejection of the agreements would have created a class of unsecured creditors. Counsel for the POC prevailed upon the debtor-in-possession to withdraw the

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[1] These potential claims and the HUD claims were the only claims, other than the "negative easement" claim, known to the owners at the beginning of the case. As noted above, the Court has been given no credible evidence that the U.S. Trustee and owners discussed any limitations on the committee's activities.

motion to assume, and materially assisted in the reorganization by renegotiating the dues structure. These efforts effectively precluded litigation over use of amenities or unreasonable dues; fees for services related to the dues structure, and for preservation of the escrow account, are properly an obligation of the AFC estate.

These cases were jointly administered until plan confirmation, at which time the estates were consolidated. The POC and BG participated actively in all phases of developing a plan of reorganization. And although some of this activity actually assisted in the final version of the negotiated plan, in large part the POC was not acting as creditors and significantly hindered and delayed resolution of the case. The clearest example was their effort to file a plan in the hotel case ("Sangre IV"). The POC and its proposed plan funder insisted that any plan for reorganizing the resort must include the hotel, and counsel vigorously pursued an attempt to gain standing in Sangre IV. To achieve this end, BG incurred $23,765.50 in fees purchasing a $50 room reservation deposit claim and attempting thereby to participate in the Sangre IV plan. This attempt to become a plan proponent in the Sangre IV case was a sham and a manipulation of the legal system, and was denied by the Court.

BG also attempted to obtain standing in Sangre IV and the other cases, by moving for substantive consolidation of the five bankruptcy cases, at a cost of $22,996.50. Joint administration of the cases had been ordered on October 27, 1993, long before BG's first fee application. Substantive consolidation of those cases was not appropriate, as evidenced by the variety of secured claims and types of estates, and even

by the nature of POC's consolidation motions ("Conditional Motion for Substantive Consolidation" and "Amended Motion for 'Hybrid' Substantive Consolidation"). Fees generated in this effort are not the obligation of the estate.

The POC also proposed plans which were to be funded by recovery on lender liability claims and called for a cram down of Parker Town Square's secured claim. This proposed treatment of Parker was very likely unconfirmable on its face, and such futile efforts are the exact object of the ruling in *Lederman, supra,* which denied fees for efforts that counsel should have known could not succeed. 997 F.2d at 1324. BG's services in pursuit of these plans are not compensable.

The committee directed much of its efforts at monitoring and controlling the use of dues paid by owners to AFC. On its face, this was an appropriate undertaking because the owners were entitled to an accounting for dues paid, and because dues partly supported operation and maintenance of the amenities. Of the approximately $10 million annual income of the resort, however, dues only amounted to approximately $1.5 million, and a motion to sequester dues was granted. The committee, undaunted, initiated litigation over intercorporate transfers of funds unrelated to owners' dues, asserting at hearing that this litigation was justified under 11 U.S.C. § 1103(c)(2). The committee's accountant testified that one-half to three-quarters of the committee's time was spent on this issue. Here again, as with their attempts to intervene and to file plans without standing to do so, the committee and counsel greatly exceeded their role as creditors. *See Cumberland Farms, supra,* 154 B.R. at 12 (investigation under § 1103 is not "free license to involve itself in every minute aspect of the debtor's

business"). Furthermore, the genuineness of the owners' concern over these transfers was put in serious doubt by BG's insistence, when AFC could not make an interim payment, that its fees be paid from funds of affiliated debtors.

The POC's litigation activities were particularly inappropriate. BG incurred fees in the amount of $120,146.00 prosecuting a declaratory judgment action over the so-called negative easement. No prior court approval was sought. *See In re Gulf USA Corp.*, 171 B.R. 379 (Bankr. Idaho 1994) (no compensation from estate if litigation not approved). The POC was concerned that the easement would not survive the bankruptcy and that the right to use the amenities was jeopardized by possible restructuring or loss of the dues covenant. The objective of the litigation was to obtain a declaration that the property owners held a negative easement in the amenities, prohibiting any other use of the amenities by management and guaranteeing the owners' right to use the amenities. The owners' underlying theory was well supported by New Mexico case law. A negative easement limits the use of a piece of land dedicated to a specific purpose such as a golf course, and prevents its use for any other purpose such as residential lots. *Cree Meadows, Inc. v. Palmer,* 68 N.M. 479, 362 P.2d 1007(1961). The owners' legal position was so strong that this Court concluded, as had the state court previously, that their pleadings did not present a case or controversy.

Furthermore, even if the committee's allegations had stated a claim for relief, the litigation was not related to the bankruptcy, and counsel's fees therefor were not allowable. The negative easement covenants established certain exclusive uses of the property, and other uses would have been

prohibited in equity. *Cree Meadows, supra,* 68 N.M. at 484-85, 362 P.2d at 1010-11. The breach, which the owners apparently foresaw at every turn but never appeared, would not have given rise to a claim cognizable under the bankruptcy code. "[R]ights to an equitable remedy for breach of performance with respect to which such breach does not give rise to a right to payment are not 'claims' within the Code's contemplation . . . unless such obligations could be translated into a claim for damages if breached." Collier on Bankruptcy, § 1 01.04 at 101-15 (15th ed. 1982), *quoted in In re Altair Airlines, Inc.,* 25 B.R. 223, 225 n.4 (Bankr. E.D. Pa. 1982). Because the litigation did not arise out of claims against the estate, counsel's fees for the litigation are not compensable.

The other problem with the easement litigation, in simple terms, was that the owners either had the easement or they did not. If the owners had no such easement, there could be no breach, obviously, and not even an equitable claim would have arisen. Conversely, if the owners were concerned, as was asserted at this hearing, that they held only contractual rights in the amenities, their litigation to transform such rights into a "property rights" – to gain more than they originally bargained for – bore no relation to the bankruptcy. And last, nobody was threatening to deprive the owners of whatever rights they had. This litigation was not necessary to protect rights of creditors and was certainly of no benefit to the estate.

The POC and counsel also attempted twice to intervene in the "Barclay" litigation, an action to determine the validity, priority, and extent of liens on the ski property (AFSC). The reason, again, for attempting to intervene was

to protect the property owners' rights in this amenity. Testimony on this issue indicated that BG attorneys were fully cognizant that restrictive covenants would not be extinguished by a foreclosure action, and that other creditors had no intent to extinguish the property owners' amenities rights. The first motion was resolved by a stipulated order denying intervention, and the Court denied a second post-judgment motion filed when an appeal was taken from the judgment. These motions were not the undertaken as allowable creditor activities. Significant amounts of fees charged by BG for litigation are not compensable from the estate.

Paralegal Fees and Expenses

With respect to paralegal services performed by BG, the parties do not dispute the reasonableness of the hourly rates charged. The disagreement is whether certain of these services, as well as copy charges, were "actual" under the statute.

Paralegal duties are not always clearly distinguishable from clerical duties. Objections to BG's first fee application put the distinction at issue, resulting in a partial reduction in the first interim award. The distinction is of no concern to the Court at this time, in light of BG's response to concerns expressed by Judge McFeeley regarding paralegal charges at the hearing on the first application. (Order of October 17, 1994.) Two days after that hearing, BG issued an office memo directing staff to change their descriptions of various clerical tasks in order to justify billing these tasks as paralegal work. Clerical services do not become compensable by being charged at paralegal rates. *In re Orthopaedic Technology, supra,* 97 B.R. at 601; *In re Almacs, Inc.*, 178 B.R. 598. As

a result, all fees for paralegal services charged subsequent to the memo are, at best, questionable as "actual" services under the statute. At worst, these charges do not survive the threshold inquiry of honesty required of officers of the Court and by Fed. R. Bankr. P. 9011. Furthermore, BG's own expert witness questioned the reasonableness of these charges. (Tr. 199.) Fees for paralegal services will be reduced accordingly.

Finally, BG sought reimbursement of $43,635.20 for copying costs from September 1993 through May 1995. Ms. Behles testified that after the first fee application, the firm received bids for bulk copying at approximately ten cents per copy, and thereafter the firm charged ten cents for bulk copying and twenty-five cents for smaller jobs. Documentary evidence, however, established that BG charged twenty-five cents per copy for the vast majority of their copies. Ms. Behles testified that these costs were reasonable, but reasonableness is not the standard for expenses. Only actual expenses are compensable. 11 U.S.C. § 330(a)(1)(A) & (B). The evidence does not support the asserted unit-cost of twenty-five cents per copy, and these expenses will be reduced accordingly.

In light of the foregoing findings and conclusions, compensable fees of BG shall be limited to services provided on the HUD claims, the escrow funds, the dues structure, and a limited amount of assistance in estate administration and plan participation. Significant amounts of paralegal fees and copy costs must be denied. At the conclusion of trial on these applications, the objectors effectively withdrew portions of their objections and proposed allowing fees in the amount of $535,507.05. And although the evidence may have supported

denial of a much greater portion of the applications, the Court is certain that, even after a three-day trial, the parties are more familiar with this case than is the Court. *See In re Puget Sound Plywood, supra,* 924 F.2d at 961 (alternative formula for reduction not abuse of discretion); *In re Kitchen Factors, supra*, 143 B.R. at 563 (affirming 50% reduction where counsel did not scale services to possible recovery). The Second, Third, and Fourth Applications for Compensation (Doc. # 637, 981, and 1311) of BG, therefore, shall be denied in part and allowed in the amount of $535,507.05. It is, therefore,

ORDERED that the Second, Third, and Fourth Applications for Compensation (Doc. # 637, 981, and 1311) by Behles-Giddens, P.A., are finally approved, and the Applications are allowed in the amount of $535,507.05. It is

FURTHER ORDERED that any sums received by Behles-Giddens, P.A., from the estate in excess of the total amount allowed by this Order and upon the First Application shall be returned to the estate forthwith. It is

FURTHER ORDERED that no further applications for compensation from Behles-Giddens, P.A., as counsel for the Property Owners Committee, herein shall be considered by the Court.

Dated: August 11, 1997

BY THE COURT

/s/_____
Roland J. Brumbaugh
United States Bankruptcy Judge

APPENDIX E

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

[Filed September 18, 1995]

No. 11-93-12176 RA

In re:	)	
	)	
ANGEL FIRE CORPORATION,	)	
ANGEL FIRE SKI	)	JOINTLY
CORPORATION, SANGRE	)	ADMINISTERED
DE CRISTO LIMITED	)	
PARTNERSHIP I, SANGRE	)	
DE CRISTO LIMITED	)	
PARTNERSHIP II, SANGRE	)	
DE CRISTO LIMITED	)	
PARTNERSHIP IV,	)	
Debtors,	)	
	)	

ORDER REGARDING SECOND, THIRD, AND FOURTH APPLICATIONS FOR COMPENSATION FILED BY COUNSEL FOR THE PROPERTY OWNERS COMMITTEE

THIS MATTER came before the Court upon the second, third, and provisional final applications for compensation filed by the law firm of Behles-Giddens, P.A.,

counsel for the Property Owners Committee. The Court, after hearing the evidence and arguments of the parties made findings and conclusions that the applications should be allowed in the sum of $535,507.05.

IT IS, THEREFORE, ORDERED that the applications for compensation by Behles-Giddens, P.A. are finally approved, and that with respect to the second, third and provisional final applications for compensation, they are allowed in the sum of $535,507.05.

IT IS FURTHER ORDERED that no further fee applications be considered for counsel for the Property Owners Committee.

/s/_____
STEWART ROSE
U.S. BANKRUPTCY JUDGE

Submitted by:

BEHLES-GIDDENS, P.A.
Attorneys for Angel Fire
Property Owners Committee

By /s/_____
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P.O. Box 849
Albuquerque, NM 87103-0849
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(505) 243-7262 (Fax)

APPENDIX F

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEW MEXICO

[Filed January 3, 1995]

No. 11-93-12176 MA

In re:	)	
	)	
ANGEL FIRE CORPORATION,	)	
ANGEL FIRE SKI	)	JOINTLY
CORPORATION, SANGRE	)	ADMINISTERED
DE CRISTO LIMITED	)	
PARTNERSHIP I, SANGRE	)	
DE CRISTO LIMITED	)	
PARTNERSHIP II, SANGRE	)	
DE CRISTO LIMITED	)	
PARTNERSHIP IV,	)	
Debtors,	)	
	)	

ORDER DENYING FIRST NATIONAL BANK OF SANTA FE'S MOTION TO AMEND ORDER AUTHORIZING EMPLOYMENT OF COUNSEL FOR THE PROPERTY OWNERS' COMMITTEE, AND FOR ORDER DIRECTING THE ATTORNEYS FOR THE POC TO DISGORGE ALL FEES AND COSTS HERETOFORE RECEIVED

THIS MATTER came before the Court upon the Motion by First National Bank of Santa Fe and Ticor Title Insurance ("FNB") to Amend order Authorizing Employment of Counsel for the Property Owners Committee ("POC") and for Order Directing the Attorneys for the POC to Disgorge all Fees and Costs Heretofore Received. Dave Giddens appeared on behalf of Behles-Giddens, P.A. ("Behles-Giddens"). FNB appeared through its counsel, Moses, Dunn, Farmer & Tuthill, P.C. (Victor Carlin). Daniel J. Behles appeared as counsel for the Debtor. After hearing testimony of witnesses, argument of counsel and Behles-Giddens' motion to dismiss FNB's Motion for lack of evidence to support it, made at the end of FNB's case, the Court finds that there has not been sufficient grounds set forth to grant FNB's Motion. Pursuant to 11 U.S.C. § 328, it would not be appropriate to disapprove all of POC's Counsels' fees and order disgorgement based on a motion of this kind, even if it were true that there were significant changes of circumstances in this case. Such denial and disgorgement of fees would only be reasonable upon the denial of a fee application based on an underlying violation of the Bankruptcy Code.

IT IS THEREFORE ORDERED:

1. FNB's Motion to Amend Order Authorizing Employment of Counsel for the Property Owners Committee ("POC") and for Order Directing the Attorneys for the POC to Disgorge all Fees and Costs Heretofore Received is hereby denied.

2. The Court's denial of FNB's Motion is not to be construed as approval of any fees to counsel for the POC

other than what has already been approved on an interim basis.

3. Future payment of fees to counsel for the POC may only be paid from the Debtor Angel Fire Corporation case, No. 11-93-12176MA, the case in which the POC was appointed. The Trustee is prohibited from borrowing funds from any of the other Debtors in order to pay counsel's fees.

4. Except for Debtor's counsel, from whom the Trustee has determined to withhold payment of fees for reasons unrelated to this matter, the Court hereby amends the September 30, 1993 Order on Motion to Employ Counsel authorizing monthly payments to counsel for the POC to allow payment only to the extent the Trustee is able to pay all other Court-approved professionals in the Angel Fire Corporation case. All Court-approved professionals, other than Debtor's counsel, must be paid monthly on an equal percentage basis, or not at all.

5. The Trustee shall ensure that all monies belonging to each of the five debtors herein shall be separately accounted for and sequestered in order to avoid commingling of funds.

/s/_____
United States Bankruptcy Judge

Submitted by:

Behles-Giddens, P.A.
Attorneys for the POC

By /s/_____
George David Giddens, Jr.
P.O. Box 849
Albuquerque, NM 87103
(505) 243-9756

Approved as to form:

Moses, Dunn, Farmer & Tuthill, P.C.
Attorneys for FNB/Ticor Title

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Bill J. Sholer, P.C.
Trustee

By Telephonic approval 12/22/94
Bill J. Sholer
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(505) 821-3343

I CERTIFY that copies were mailed to listed counsel on the date file-stamped above.

/s/_____
Deputy Clerk

Behles & Associates
Counsel for the Debtors

By Telephonic approval 12/23/94
Daniel J. Behles
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APPENDIX G

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

[Filed November 21, 1994]

No. 11-93-12176 MA

In re:	)
	)
ANGEL FIRE CORPORATION,	)
Debtors,	)
	)

ORDER APPROVING SECOND INTERIM APPLICATION FOR REIMBURSEMENT OF ACTUAL, NECESSARY EXPENSES INCURRED BY PROPERTY OWNERS' COMMITTEE MEMBERS

THIS MATTER came before the Court upon the Second Interim Application for Reimbursement of Actual, Necessary Expenses Incurred by the Members of the Angel Fire Property Owners, Committee, filed herein on October 18, 1994. The Court being fully advised in the premises finds that proper notice was given and that no objections were received, that the expenses sought are reasonable, necessary and a benefit to the estate;

IT IS THEREFORE ORDERED that payments be made by the Debtor to the following committee members as reimbursement for their actual, necessary expenses:

H. Wayne Jones	$ 899.57
Herbert Kalen	$ 930.00
Zene Hemphill	$1,891.66
Ruth Bush	$ 705.00
Alfred J. Smith	$ 203.02
Russell Sylvester	$ 160.86

The total reimbursement to committee members is $4,790.11 for the actual and necessary expenses requested by those committee members from March 1, 1994, through August 31, 1994.

/s/_____
MARK B. McFEELEY
U. S. Bankruptcy Judge

Submitted by:

BEHLES-GIDDENS, P.A.
Attorneys for POC

By /s/_____
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APPENDIX H

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

[Filed October 27, 1994]

No. 11-93-12176 MA

In re:	)
	)
ANGEL FIRE CORPORATION,	)
Debtors,	)
	)

ORDER PARTIALLY APPROVING AND PARTIALLY DISAPPROVING PAYMENT OF PROPERTY OWNERS' COMMITTEE'S FIRST INTERIM APPLICATION FOR COMPENSATION OF COUNSEL

THIS MATTER came before the Court for a final hearing on the first application for compensation for the counsel for the Property Owners' Committee, and upon the objection filed thereto by the First National Bank of Santa Fe. Applicant was represented by George D. Giddens, Jr., and the First National Bank in Santa Fe was represented by Moses, Dunn, Farmer & Tuthill, P.C. (Thomas Dunn). The Court, having heard the testimony, reviewed the evidence and the arguments of the parties, and being fully advised in the premises, FINDS:

1. This matter was the subject of two prior orders, entered June 20, 1994, and September 22, 1994. The previous two orders had approved all of the compensation requested in the first interim application for compensation except the sum of $11,909.50, plus applicable gross receipts tax.

2. After the continuation of the final hearing on September 12, 1994, the Court took under advisement the question of whether the $11,909.50 should be allowed.

3. The Court finds that a total of 52.15 hours of requested paralegal time represents services that should have been classified as secretarial or clerical services and was not appropriately chargeable to this estate.

4. At the applicable hourly rate of $50.00 per hour, the 52.15 disallowed hours represents $2,607.50 plus gross receipts tax in the amount of $151.56, making the total amount disallowed $2,759.06.

5. After deducting the $2,607.50 from the requested amount of $11,909.50, applicant should be awarded the remaining balance of the first interim application in the amount of $9,302.00 plus applicable gross receipts tax equalling $540.68, making the total amount awarded $9,842.68.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that an interim allowance of compensation to the applicant in the amount of $9,842.68, representing $9,302.00 of professional services and $540.68 of gross receipts tax be,

and the same hereby is, approved as an expense of administration pursuant to 11 U.S.C. §503.

IT IS FURTHER ORDERED that the application is disallowed to the extent of $2,607.50 plus $151.56 gross receipts tax, totalling $2,759.06.

/s/_____
MARK McFEELEY
U.S. Bankruptcy Judge

Approved:

BEHLES-GIDDENS, P.A.
Attorneys for the Applicant

By /s/_____
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MOSES, DUNN, FARMER & TUTHILL
Attorneys for First National
Bank in Santa Fe

By /s/_____
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(505) 247-3213

APPENDIX I

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

[Filed September 22, 1994]

No. 11-93-12176 MA

In re:	)	
	)	
ANGEL FIRE CORPORATION,	)	
ANGEL FIRE SKI	)	JOINTLY
CORPORATION, SANGRE	)	ADMINISTERED
DE CRISTO LIMITED	)	
PARTNERSHIP I, SANGRE	)	
DE CRISTO LIMITED	)	
PARTNERSHIP II, SANGRE	)	
DE CRISTO LIMITED	)	
PARTNERSHP IV,	)	
Debtors,	)	
	)	

ORDER APPROVING SECOND INTERIM ALLOWANCE OF COMPENSATION ON COUNSEL FOR THE PROPERTY OWNERS' COMMITTEE'S FIRST APPLICATION FOR COMPENSATION

THIS MATTER came before the Court for a continuation of the final hearing on the First Application for Compensation of the Counsel for the Property Owners'

Committee, and upon the objection filed thereto by the First National Bank of Santa Fe. Applicant was represented by George D. Giddens, Jr., and the First National Bank in Santa Fe was represented by Thomas Dunn. The Court, having heard the testimony and arguments of the parties, and being fully advised in the premises, FINDS:

1. That after the Court's order of June 20, 1994, of the total amount requested to be approved, the sum of $48,807.10 plus $603.10 for preparation of the application, remained unapproved.

2. The Court further finds that applicant has agreed to reduce the application by the sum of $3,150.40, plus the sum of $1,040.00, representing time that applicant believes to be clerical time inadvertently contained in the application. After the foregoing deductions, there remains unapproved from the First Application for Compensation the sum of $44,616.70.

3. With the exception of all sums itemized in applicant's Exhibit No. 11 ($11,909.50), and the services specified in Item No. 4 in applicant's Exhibit No. 13 ($143.00) , applicant demonstrated that the remainder of the services requested in the application were actually necessary for representation of the Property Owners' Committee, and that the sums requested are reasonable. Applicant is, therefore, entitled to a second interim allowance of compensation in the total sum of $32,564.20, plus applicable tax.

4. The Court will take under advisement the question of whether or not the sums specified in applicant's

Exhibit No. 11, totalling $11,909.50 represent actual and necessary services for which compensation should be allowed.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that:

1. A second interim allowance of compensation to the applicant in the amount of $32,564.20, plus applicable gross receipts tax be, and the same hereby is approved as an expense of administration pursuant to § 11 U.S.C. 503.

2. The Court will take under advisement the question of whether the remaining $11,909.50, or any portion thereof, should be approved as compensation to the applicant.

3. Applicant is awarded a further $603.10 for preparation of the first application for compensation.

4. The total amount of the second interim allowance of compensation approved pursuant to this order equals $33,149.30.

/s/_____
MARK B. MCFEELEY
United States Bankruptcy Judge

Approved by:

BEHLES-GIDDENS, P.A.
Attorneys for POC

By /s/_____
George D. Giddens, Jr.
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MOSES, DUNN, FARMER &
TUTHILL, P.C.
Attorneys for First National
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(505) 247-3213 (Fax)

I CERTIFY that copies were mailed to listed counsel on the date file-stamped above.

/s/_____
Deputy Clerk

APPENDIX J

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

[Filed June 20, 1994]

No. 11-93-12176 MA

In re:	)	
	)	
ANGEL FIRE CORPORATION,	)	
ANGEL FIRE SKI	)	JOINTLY
CORPORATION, SANGRE	)	ADMINISTERED
DE CRISTO LIMITED	)	
PARTNERSHIP I, SANGRE	)	
DE CRISTO LIMITED	)	
PARTNERSHIP II, SANGRE	)	
DE CRISTO LIMITED	)	
PARTNERSHIP IV,	)	
Debtors,	)	
	)	

ORDER APPROVING PARTIAL PAYMENT OF PROPERTY OWNERS' COMMITTEE'S FIRST INTERIM APPLICATION FOR COMPENSATION

THIS MATTER having come before the court upon the final hearing held on First National Bank of Santa Fe's objection to the First Application for Compensation of counsel

for the Property Owners' Committee (the "Application"), and the Court having heard testimony and having decided to continue this matter until September 12, 1994, at 9:00 a.m., makes the following findings:

1. That counsel for the Property Owners' Committee, Behles-Giddens, P.A., has agreed in settlement of all objections to the Application, except the objection of First National Bank of Santa Fe, to reduce its total fee application by $3,150.40.

2. The Court further finds that the total fees, costs and tax requested by counsel for the Property Owners' Committee equals $181,782.78, of which the total outstanding unpaid balance to counsel for the Property Owners' Committee is $96,807.10, plus $603.10 for preparation of the Application.

3. The Court finds that the total amount objected to by First National Bank of Santa Fe is $27,889.40. After deduction of that amount plus the $3,150.40 which Behles-Giddens, P.A. has agreed to withdraw from the Application, approval of an interim allowance to Behles-Giddens, P.A. in the amount of $48,000.00 is reasonable

4. After the foregoing interim allowance, there will be owing to Behles-Giddens, P.A. pursuant to the Application the sum of $48,807.10, plus $603.10 for preparation of the Application. Said amounts shall remain outstanding until the Court concludes the hearing on the Application.

5. The Court further finds that, there being no remaining objections to the Application, except that First National Bank of Santa Fe, as set forth in Paragraph 3 above, the remainder of the compensation requested in the Application, except the sums specified in Paragraph 4 above, represents actual and necessary, services and is reasonable, and should be approved on a interim basis.

IT IS THEREFORE ORDERED:

1. That the total outstanding unpaid balance of fees owed to the firm of Behles-Giddens, P.A., under the Application, equals $96,807.10 ($99,957.50 - $3,150.40).

2. That the sum of $603.10 is also outstanding to Behles-Giddens, P.A., for the preparation of the Application.

3. That Behles-Giddens has agreed to voluntarily reduce the Application by $3,150.40.

4. That Behles-Giddens, P.A., shall receive the sum of $48,000.00 of its outstanding unpaid balance upon the entry of this Court order as an interim award of compensation.

5. That the remaining balance of Fees owed to Behles-Giddens, P.A., in the amount of $48,801.10 and $603.10, shall remain unpaid pending the final hearing on the Application, which shall be held on September 12, 1994, at 9:00 a.m.

6. That with the exception of the sums provided in Paragraph 5, the remainder of the sums requested in the

Application, be and hereby are, approved on an interim basis.

BY THE COURT

/s/_____
United States Bankruptcy Judge

Submitted By:

BEHLES-GIDDENS, P.A.
Attorneys for Property Owners Committee

By /s/_____
George Behles-Giddens, Jr.
P. Diane Webb
P.O. Box 849
Albuquerque, NM 87103-0849
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Approved as to Form and Content:

MOSES, DUNN, FARMER
& TUTHILL, P.C.
Attorneys for First National
Bank of Santa Fe

By Telephone Approval 6/14/94
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I CERTIFY that copies were mailed to listed counsel on the date file-stamped above.

/s/_____
Deputy Clerk

APPENDIX K

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

[Filed June 13, 1994]

No. 11-93-12176 MA

In re:	)	
	)	
ANGEL FIRE CORPORATION,	)	
ANGEL FIRE SKI	)	JOINTLY
CORPORATION, SANGRE	)	ADMINISTERED
DE CRISTO LIMITED	)	
PARTNERSHIP I, SANGRE	)	
DE CRISTO LIMITED	)	
PARTNERSHIP II, SANGRE	)	
DE CRISTO LIMITED	)	
PARTNERSHIP IV,	)	
Debtors,	)	
	)	

STIPULATED ORDER COMPROMISING DEBTOR'S OBJECTION TO POC COUNSEL'S FIRST APPLICATION FOR COMPENSATION

THIS MATTER came before the Court upon the stipulation between Behles-Giddens, P.A. ("Applicant") and the Debtor to Applicant's first application for compensation.

Debtor previously having partially withdrawn its objection to the Application, the parties have agreed to compromise and finally settle Debtor's remaining objection by Applicant reducing the request for compensation by $3,150.40. By his signature hereto, the United States Trustee agrees to the parties' stipulation. The Court finds that the stipulation is reasonable and should be approved.

IT IS THEREFORE ORDERED that the stipulation of the parties for Applicant to reduce its first request for compensation by $3,150.40 is hereby approved as a complete settlement of both the Debtor's and the United State's Trustee's objection to the first fee application of counsel for the Property Owners' Committee.

/s/_____
The Honorable Mark B. McFeeley
Bankruptcy Court Judge

Submitted By:
BEHLES-GIDDENS, P.A.
Attorneys for POC

By /s/_____
Jennie Deden Behles
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BEHLES &ASSOCIATES
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OFFICE OF THE UNITED STATES TRUSTEE

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(505) 766-3103

I CERTIFY that copies were mailed to listed counsel on the date file-stamped above.

/s/_____
Deputy Clerk

APPENDIX L

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed March 1, 2000]

No. No. 98-2198

BEHLES-GIDDENS, P.A., now known as J.D. BEHLES AND ASSOCIATES, P.C., *Appellant,*	)
v.	)
ANGEL PROJECT I, LTD., and UNITED STATES TRUSTEE, *Appellees.*	)

ORDER

Before **BRORBY** and **McWILLIAMS**, Circuit Judges, and **WEST**,* District Judge.

Appellant's petition for rehearing is denied.

---

* The Honorable Lee R. West, Senior United States District Judge for the Western District of Oklahoma, sitting by designation.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/_____
Deputy Clerk

Supreme Court, U.S.
FILED
JUN 28 2000
CLERK

(2)

No. 99-1907

In The

Supreme Court of the United States

BEHLES-GIDDENS, P.A., now known as
J.D. BEHLES & ASSOCIATES, P.C.,

Petitioner,

v.

ANGEL PROJECT I, LTD., and
UNITED STATES TRUSTEE,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

WALTER L. REARDON, JR.
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Counsel for Respondent Angel Project I, Ltd.

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OR CALL COLLECT (402) 342-2831

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STATUTES INVOLVED

In addition to statutes cited by Petitioner, this case involves Bankruptcy Code, 11 U.S.C. § 327 set out below.

§ 327. Employment of professional persons.

(a) Except as otherwise provided in this section, the Trustee, with the Court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the Trustee in carrying out the Trustee's duties under this title.

(b) If the Trustee is authorized to operate the business of the debtor under section 721, 1202, or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the Trustee may retain or replace such professional persons if necessary in the operation of such business.

(c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States Trustee, in which case the Court shall disapprove such employment if there is an actual conflict of interest.

(d) The Court may authorize the Trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.

(e) The Trustee, with the Court's approval, may employ, for a specified special purpose, other than to represent the Trustee in conducting the case, an attorney

that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

(f) The Trustee may not employ a person that has served as an examiner in the case.

STATEMENT OF THE CASE

Respondent disagrees with the Petitioner's statement of the case and would point out that in addition to the sum of $535,507.05 awarded on the second, third, and fourth Fee Applications, the Court had already approved, on an interim basis, compensation of $179,473.79 which resulted in total compensation to Behles-Giddens of $714,980.79. By contrast, debtor's counsel, Daniel J. Behles was awarded $185,186.55 and the Chapter 11 Trustee was awarded $236,285.45. Thus, compensation for the Committee Counsel was three times greater than other professionals in the case even after the reduction from the $1,228,001.76 total of Fee Applications.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT RAISE THE QUESTION PRESENTED BY THIS PETITION

This case does not present a question in which a previously approved, defined compensation arrangement such as a fixed fee or contingent fee was reexamined by

the Court. Generally, the cases under § 328(a) involve special counsel employed for a specific purpose by the debtor or bankruptcy trustee, not debtors counsel or committee counsel. Occasionally, the fee is a contingent fee such as in *In re Confections by Sandra, Inc.*, 83 B.R. 729 (9th Cir. BAP 1987) in which the trustee had hired an attorney for the specific purpose of pursuing a fire loss claim. In the *National Gypsum Company* case, DLJ Securities Corporation had pre-approved compensation of $125,000.00 per month for its services. The Court ruled that if prior approval is given to a certain compensation, Section 328 controls and the Court starts with the approved compensation, modifying only for developments unforseen when originally approved. *In re National Gypsum Company*, 123 F.3d 861 (5th Cir. 1997). The cases cited by Petitioner involve contingent fees and an "earned upon receipt" retainer agreement.

The Amended Motion to Employ Counsel for the Property Owners' Committee is reproduced as Appendix A. The Order on Motion to Employ Counsel for the Unsecured Creditors' Committee is reproduced as Appendix B. The Motion attaches a Fee and Cost Schedule and provides for monthly billings and a method for partial payment subject to a separate Order of the Court allowing fees for the time period in question. The Order directed the filing of Fee Applications at least every 180 days. Neither the Motion nor the Order expressly refer to Section 328(a) nor do they approve any predetermined fee arrangement.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS PRESENTED BY THE FACTS OF THIS CASE

In the Courts below, Behles-Giddens was unsuccessful in convincing the Bankruptcy Judge, the District Judge, and the Tenth Circuit Court of Appeals that portions of its Fee Application were actual and necessary. Behles-Giddens seeks to avoid the Court's scrutiny of its Fee Application under § 330 and contends that the compensation may only be reduced pursuant to § 328(a) for " . . . developments not capable of being anticipated at the time and fixing of such terms and conditions." This position is not supported by case law outside of bankruptcy or in bankruptcy. Outside of bankruptcy, in New Mexico, an attorney employed on an hourly basis even at agreed hourly rates, has the burden of showing that the amount of time expended was reasonable and that the time was fairly and properly used. *Hinkle, Cox, et al. v. Cadle Company*, 115 N.M. 152, 848 P.2d 1079 N.M. (1993).

The Tenth Circuit holds that professional services are not "necessary" under § 330(a)(1), unless such services benefit the bankruptcy estate. *In re Lederman Enterprises, Inc.*, 997 F.2d 1321 (10th Cir. 1993). If the services did not benefit the estate, there is no need to inquire whether the charges for the services rendered were "reasonable." 997 F.2d at 1323.

The Tenth Circuit uses a two-pronged test. The first is an inquiry regarding benefit to estate. For the Application to be approved, Behles-Giddens was required to show its services benefitted the estate. Only after the Court is satisfied with the first prong may the Court move on to

the second prong and determine the reasonableness of the fees.

While the *Lederman* case concerned allowance of fees for the debtor's counsel, rather than for a § 1102 committee's counsel, the ruling was not limited to allowance of debtor's counsel fees. Rather, the *Lederman* holding applies to all attorneys and professional persons whose compensation is governed by § 330. Because § 330 clearly refers and applies to attorneys employed under § 1103, the *Lederman* standard applies to Behles-Giddens' fee applications.

The Tenth Circuit follows the majority rule. *See, e.g., In re Alcala*, 918 F.2d 99, 103 (9th Cir. 1990); *In re Reed*, 890 F.2d 104, 105-06 (8th Cir. 1989). The minority view is that benefit to the estate is not a threshold matter but is part of the test for reasonableness. *In re Coastal Nursing Center*, 162 B.R. 918 (Bankr. S.D. Ga. 1993). This case does not turn on this distinction.

III. THIS CASE DOES NOT HAVE FAR-REACHING BANKRUPTCY IMPLICATIONS

This case involves a Chapter 11 reorganization of a partially completed resort property in northern New Mexico known as the Angel Fire Resort. This proceeding was unusual because it had very few unsecured trade creditors. The committee that was finally appointed was referred to as the Property Owners' Committee. The Bankruptcy Court's opinion denied compensation for activities undertaken by the Committee which were not related to claims of creditors. For example, the Court denied compensation for activities related to the negative

easement litigation (Petitioner's Appendix D, page 27a) and an attempt to obtain standing in the estate of Sangre De Cristo IV which operated a hotel. Petitioner's Appendix D, page 25a. These issues are not typical of those found in the average Chapter 11 reorganization and may be limited to partially completed resort-type reorganizations.

Attorney fee issues tend to be fact intensive and context specific. The factors announced in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) are well settled. These factors are sometimes referred to as the "Lodestar" analysis and have been adopted in the Tenth Circuit in *First National Bank v. Niccum* (*In re Permian Anchor Services*), 649 F.2d 763, 768 (10th Cir. 1981). Reviewing Fee Applications is usually committed to the discretion of the reviewing judge and generally will not be reversed unless clearly erroneous. *Mares v. Credit Bureau of Raton*, 801 F.2d 1197 (10th Cir. 1986). The review does not involve a search for an exact fee and there is a range of reasonableness in all fee awards. *In re Casull*, 139 B.R. 525, 530 (Bankr. D. Colo. 1992).

Based upon the above factors, it is unlikely that this case would have far-reaching bankruptcy or other implications sufficient to warrant review by this Court.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

WATROUS & REARDON
WALTER L. REARDON, JR.
Attorney for Angel Project I, Ltd.
3733 Eubank Blvd., N.E.
Albuquerque, NM 87111-3536
Telephone: (505) 293-7000
Fax: (505) 293-0831
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APPENDIX A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

(Filed September 24, 1993)

No. 11-93-12176 MA

In Re:	)
Angel Fire Corporation Tax I.D. No. 85-0226843	)
Debtor.	)

AMENDED MOTION TO EMPLOY COUNSEL FOR THE PROPERTY OWNERS' COMMITTEE

COMES NOW The Property Owners' Committee and amends its motion to the Court for an Order employing the firm of BEHLES-GIDDENS, P.A., to represent the Property Owners' Committee ("Committee") in the above-referenced proceeding, and as grounds therefore states:

1. This motion has been amended to reflect that the Committee formed in this case is a Property Owners' Committee; the original motion filed on September 21, 1993 showed the Committee as the Unsecured Creditors' Committee.

2. Committee wishes to employ the firm of BEHLES-GIDDENS, P.A., attorneys duly admitted to practice in this Court, for the purpose of representing Committee in this Chapter 11 proceeding.

3. Committee has selected these attorneys for the reason that Committee believe that attorneys possess the skills and experience necessary to represent them.

4. The Committee desires to employ attorneys according to the terms and conditions shown on the fee and cost schedule attached hereto as Exhibit "A," which details the hourly rates for the attorneys who may participate in representation of the Committee.

5. The attorneys for the Committee may bill the estate for costs and attorneys' fees monthly; however, all sums paid from the Committee shall be applied only as follows: (1) The attorneys for the Committee may apply the funds received in payment of the bill to 75% of the fees and 75% of the tax on a monthly basis and to 100% of the costs. (2) The balance of the payment for the billing shall be held by the attorney for the Committee in its trust account, and shall be applied to the billings only upon separate order of this Court allowing the fees for the time period in question.

6. Employment of attorneys would be in the best interest of the Estate and should therefore be approved.

7. The office of the U.S. Trustee has been contacted for concurrence in this Motion and Trustee has approved the motion.

Respectfully submitted:

BEHLES-GIDDENS, P.A.
Attorneys for UCC

/s/_____

P. O. Box 849
Albuquerque, NM 87103
(505) 243-9756
(505) 243-7262 (fax no.)

I hereby certify that a true copy of the foregoing was mailed to:

U.S. Trustee
P.O. Box 608
Albuquerque, NM 87103

this 24th day of September, 1993.

/s/_____

Westlaw: Westlaw is a computer legal research system which is used by this firm when research concerning issues in your case is necessary. Westlaw bills this firm for actual time that we are in contact with its computer facilities. On the cost portion of your bill you will find any Westlaw charges incurred during the billing period. Westlaw is charged to you at the rate of $5.45 per minute of actual computer time.

The Technet Legal Network, LegalNet, is a state-wide fiber-optic research and communications computer network designed to meet the information needs of the New Mexican legal community. This office may use the following computer networks when researching issues in your case: The State Bar of New Mexico State and Federal Court Records, Bankruptcy Court Records, State Corporation Commission Records, Motor Vehicle Division's Driver Citations and Vehicle Registration data bases. LegalNet bills this firm for actual time that we are in contact with its computer facilities. On the cost portion of your bill you will find any LegalNet charges incurred during the billing period. LegalNet is charged to you at the rate of $.62 per minute of actual computer time, $4.00 per record for State Corporation Commission, $2.00 per record from the Motor Vehicle Division, $2.50 per case for State, Federal, and Bankruptcy Dockets.

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"A"

BEHLES-GIDDENS, P.A.

HOURLY FEE SCHEDULE

Jennie Deden Behles	$185.00
George D. Giddens, Jr.	$155.00
Rebecca E. Wardlaw	$155.00
P. Diane Webb	$155.00
Jeanne A. Hamrick	$110.00
Steven Tal Young	$110.00
Jennifer L. Street	$110.00
Jeffrey D. Wallace	$110.00
Karen W. Howden	$110.00
Legal Assistants	$ 50.00

APPENDIX B

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

(Filed September 30, 1993)

No. 11-93-12176 MA

In Re:	)
Angel Fire Corporation Tax I.D. No. 85-0226843	)
Debtor.	)

ORDER ON MOTION TO EMPLOY COUNSEL FOR THE UNSECURED CREDITORS' COMMITTEE

THIS MATTER having come before the Court on Motion to Employ Counsel for the Property Owners' Committee, filed herein on September 21, 1993, and the Amended Motion filed subsequently, and the Court being satisfied that said law firm, Behles-Giddens, P.A., represents no interest adverse to Debtor or the Estate in the matters upon which it is to be employed, their employment is approved.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Estate is allowed to pay seventy-five percent (75%) of all attorney's fees, as well as one hundred percent (100%) costs and expenses, on a monthly basis, upon receipt by Debtor of statements rendered. The balance of the payment for the billings shall be applied to the billings upon separate Order of this Court allowing

the Attorney's Fee Applications, which Fee Applications will be filed at least every 180 days.

/s/ _____
MARK B. MCFEELEY
BANKRUPTCY COURT JUDGE

Supreme Court, U.S.
FILED
JUL 2 8 2000
CLERK

(3)

No. 99-1907

In the Supreme Court of the United States

J.D. BEHLES & ASSOCIATES, PETITIONER

v.

ANGEL PROJECT I, LTD.,
AND UNITED STATES TRUSTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES TRUSTEE IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

JACOB M. LEWIS
Attorney

Department of Justice
Washington, D.C. 20530-0001
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20PP

QUESTION PRESENTED

Whether the bankruptcy court erred in disallowing attorney's fees requested by petitioner as not "actual" or "necessary" within the meaning of 11 U.S.C. 330(a).

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In the Supreme Court of the United States

No. 99-1907

J.D. BEHLES & ASSOCIATES, PETITIONER

v.

ANGEL PROJECT I, LTD.,
AND UNITED STATES TRUSTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES TRUSTEE IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unpublished, but the decision is noted at 203 F.3d 834 (Table). The district court's order adopting the magistrate judge's proposed analysis and recommended disposition is unreported (App., *infra*, 1a). The bankruptcy court's decision disallowing petitioner's fees in part (Pet. App. 16a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 2000. A petition for rehearing was denied on March 1, 2000 (Pet. App. 56a-57a). The petition for a writ of certiorari was filed on May 30, 2000. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Bankruptcy Code provides for the employment and compensation of professional persons, including attorneys, to assist in the administration and resolution of claims against a bankrupt estate. 11 U.S.C. 327-331. Section 330 of the Code generally provides that after notice and a hearing, the bankruptcy court may award "reasonable compensation for actual, necessary services rendered by the * * * attorney," as well as "reimbursement for actual, necessary expenses." 11 U.S.C. 330(a)(1). If the terms and conditions of such compensation have been approved in advance, however, the court may allow different compensation after the conclusion of the attorney's employment only "if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions." 11 U.S.C. 328(a).

2. Petitioner, a law firm, represents the Property Owners Committee (POC) in Chapter 11 bankruptcy proceedings initiated by the Angel Fire Corporation, a holding company which operated a ski resort in northern New Mexico. Pet. 5; Pet. App. 8a. The bankruptcy court approved petitioner's application to represent the POC in September 1993 and authorized the estate to pay petitioner 75% of billed fees and 100% of billed costs on a monthly basis, with fee applications to be filed not less than every 180 days. App., *infra*, 2a-3a; see Pet. App. 9a.

3. This case involves three attorney's fees applications filed by petitioner in 1994 and 1995.* The applications requested approval of fees and costs amounting to a total of $1,044,860.23, of which $565,896.38 had already been paid in accordance with the bankruptcy court's order approving petitioner's employment. Pet. App. 9a-10a. After considering all three applications at a consolidated hearing over several days in July of 1995, the bankruptcy court awarded petitioner a total of $535,507.05. Pet. App. 33a. On appeal, the district court reversed and remanded for the entry of adequate findings of fact and conclusions of law. Pet. App. 6a.

On remand, a successor bankruptcy judge again awarded fees totaling $535,507.05. Pet. App. 31a. Citing Section 330, the bankruptcy court emphasized that the applications could be approved "only for actual and necessary services and expenses and the fees must be reasonable." Pet. App. 20a. The bankruptcy court explained that the objections to petitioner's applications in this case were "resolved by determining whether services and expenses were actual and necessary," since "[t]he objectors do not contend that the amount of time spent by [petitioner] on necessary services, or the firm's hourly rates, were unreasonable under the circumstances." Pet. App. 23a.

The bankruptcy court determined that while some of the efforts of petitioner and the POC "assisted in the final version of the negotiated plan [of reorganization], in large part the POC was not acting as creditors and

---

* Petitioner filed a prior application, covering the period from September 21, 1993 to January 31, 1994, on February 25, 1994. The bankruptcy court approved all but approximately $3,000 of the fees and costs sought in that application, which is not at issue here. Pet. App. 9a.

significantly hindered and delayed resolution of the case." Pet. App. 25a. The court found that those aspects of petitioner's efforts did not benefit the estate and were thus "not compensable." Pet. App. 25a-29a (discussing petitioner's inappropriate activities in detail). The court also found that certain paralegal services for which petitioner sought compensation, as well as copying costs, were not actually incurred. Pet. App. 29a-30a. In the end, "although the evidence may have supported denial of a much greater portion of the applications," the court accepted the objectors' proposal to allow fees in the amount of $535,507.05, and ordered petitioner to return the excess. Pet. App. 30a-31a.

4. In an unpublished decision, the Tenth Circuit affirmed the district court's decision to approve the bankruptcy court's award. Pet. App. 1a-4a. The court agreed that "[a] determination of whether the claimed services were actual and/or necessary is dispositive of the issues presented in this case." Pet. App. 4a. Based upon its review of the record, the court of appeals found that the bankruptcy court's award was "reasonable compensation for the actual and necessary services rendered by [petitioner]." *Ibid.* On March 1, 2000, the court of appeals denied petitioner's petition for rehearing en banc. Pet. App. 56a-57a.

ARGUMENT

The court of appeals' unpublished decision turns on fact-specific determinations concerning the appropriateness of the attorney's fees to be recovered in this bankruptcy case. Those determinations, which were properly made under the authority vested by the Bankruptcy Code, do not conflict with any decision of this Court or of any other court of appeals. Review by this Court is accordingly unwarranted.

1. Petitioner does not point to any infirmity in the bankruptcy court's analysis of whether its fees were actual and necessary within the meaning Section 330. Instead, petitioner contends (Pet. 9-10, 12) that the bankruptcy court could not have reduced its fees without a determination under Section 328(a) that the terms and conditions of its employment were "improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions." 11 U.S.C. 328(a). See *Donaldson, Lufkin & Jenrette Sec. Corp.* v. *National Gypsum Co. (In re National Gypsum Co.)*, 123 F.3d 861, 862 (5th Cir. 1997); *Pitrat* v. *Reimers (In re Reimers)*, 972 F.2d 1127, 1129 (9th Cir. 1992).

The determination of improvidence required by Section 328(a) only applies, however, when the bankruptcy court has previously approved the terms and conditions upon which a professional has been employed. There was no such prior approval in this case. The bankruptcy court's Sept. 30, 1993 order simply approved petitioner's employment and authorized the estate to "pay seventy-five percent (75%) of all attorney's fees, as well as one hundred percent (100%) [of all] costs and expenses, on a monthly basis, upon receipt by Debtor of statements rendered." App., *infra*, 8a. The order does not specify, much less approve, the rates petitioner was to charge, or the total compensation it was to receive. The order plainly does not provide petitioner with a blank check to receive compensation in any amount without further court oversight; on the contrary, the order specifically contemplates that petitioner's fees would be allowed only as provided for in subsequent "separate Order[s]" on subsequently filed fee applications. App., *infra*, 9a.

Because the bankruptcy court's order did "not expressly and unambiguously state specific terms and conditions * * * that are being approved pursuant to the first sentence of section 328(a)," the court was free to apply the standards of Section 330(a) "unfettered by the strictures of the second sentence of section 328(a)." *Zolfo, Cooper & Co.* v. *Sunbeam-Oster Co.*, 50 F.3d 253, 261 (3d Cir. 1995). Accord *Unsecured Creditors' Comm.* v. *Puget Sound Plywood, Inc.*, 924 F.2d 955, 960 (9th Cir. 1990) (absent "evidence that the court approved [the lawyer's] fee arrangement, § 328 is not applicable"). Indeed, even if the order approving petitioner's employment could be read to approve petitioner's hourly rates—and there is no evidence that this was the case—the court would still have been free to examine the hours expended and the services performed to determine whether they were "actual" and "necessary." 11 U.S.C. 330(a)(1)(A). See, *e.g.*, *Puget Sound Plywood*, 924 F.2d at 960 ("even if the bankruptcy court approved an hourly rate, if it did not fix the number of allowed hours, that matter still would be subject to the court's review"). As its opinion made clear, the bankruptcy court in this case resolved the objections to petitioner's fee requests "by determining whether services and expenses were actual and necessary, not whether the fees charged were reasonable." Pet. App. 23a.

As the Third Circuit recognized, the bankruptcy court has a "duty to conduct an independent examination of fee applications for services rendered." *Zolfo, Cooper & Co.*, 50 F.3d at 262. That duty "would be unduly restricted if employment authorization orders were routinely construed as binding the court to particular terms of employment." *Ibid.*

2. Relying on the First Circuit's decision in *Boston & Maine Corp.* v. *Moore*, 776 F.2d 2, 6-7 (1st Cir. 1985), petitioner asserts (Pet. 9) that the courts of appeals are split on the proper analysis for an award of attorney's fees under Sections 328(a) and 330(a). But the *Boston & Maine* decision—which petitioner presents as evidence that the First Circuit "adheres to the lodestar approach under Section 330(a), irregardless [*sic*] of Section 328(a), when reviewing applications for compensation" (Pet. 9)—involved compensation issues arising under the pre-1978 version of the Bankruptcy Code, which contained neither provision. See *Boston & Maine*, 776 F.2d at 5 (applying "former section 77 of the Bankruptcy Act of 1898").

Petitioner also contends that there are "differing opinions" among the bankruptcy courts "on the question of the impact of Section 328(a) on pre-approved fee arrangements." Pet. 10. But even if it could be shown that there were such a conflict among the bankruptcy courts, the matter would not ordinarily be one requiring this Court's review. See Robert L. Stern et al., *Supreme Court Practice* 180 (7th ed. 1993) (because bankruptcy judge decisions are subject to review by district courts and then courts of appeals, conflicts between such decisions do not ordinarily merit resolution by the Supreme Court).

In any event, as shown above, this case does not involve an order to which Section 328(a) would apply. It therefore is not a proper vehicle for addressing any issues that might arise under that provision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Acting Assistant Attorney General

JACOB M. LEWIS
Attorney

JULY 2000

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CIV. No. 97-1127 JC/RLP

BEHLES-GIDDENS, P.A., APPELLANT

v.

ANGEL FIRE CORPORATION, ET AL., APPELLEES

[Filed: July 15, 1998]

JUDGMENT

THIS MATTER came before the Court on Appellant's appeal, filed pursuant to 28 U.S.C. § 158. Pursuant to the Order that adopts the proposed findings and recommended disposition of the United States Magistrate Judge and which accompanies this Judgment,

IT IS THEREFORE ORDERED AND ADJUDGED that this case is dismissed with prejudice in its entirety.

/s/ JOHN EDWARDS CONWAY
JOHN EDWARDS CONWAY
Chief United States
District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CIV. No. 97-1127 JC/RLP

BEHLES-GIDDENS, P.A., APPELLANT

v.

ANGEL FIRE CORPORATION, ET AL., APPELLEES

[Filed: July 15, 1998]

ORDER

THIS MATTER having come before the Court on the proposed findings and recommended disposition of the United States Magistrate Judge, the Appellant having filed objections thereto and the Court having made a *de novo* review of the record, findings that the objections are not well-taken, and that the proposed findings and recommended disposition of the United States Magistrate Judge shall be adopted;

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the proposed findings and recommended disposition of the United States Magistrate Judge are adopted by the Court and that this matter is dismissed with prejudice.

IT IS SO ORDERED.

/s/ JOHN EDWARDS CONWAY
JOHN EDWARDS CONWAY
Chief United States
District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CIV. No. 97-1127 JC/RLP

BEHLES-GIDDENS, P.A., APPELLANT

v.

ANGEL FIRE CORPORATION, ET AL., APPELLEES

[Filed: June 22, 1998]

MAGISTRATE JUDGE'S PROPOSED
ANALYSIS AND RECOMMENDED DISPOSITION[†]

---

1. This is the second appeal in this matter. In my September 6, 1996 Proposed Analysis and Recommended Disposition (PRD), adopted by the District Court in Civ. No. 95-1154 SC/RLP, I concluded that the Bankruptcy Court had failed to set forth its reasons for the attorney fee award. Thus, I recommended that the

---

[†] Within ten (10 days after a party is served with a copy of these proposed findings and recommendations that party may, pursuant to 28 U.S.C. § 636(b)(1), file written objections within the ten-day period allowed if that party wants to have appellate review of the proposed findings and recommendations. If no objections are filed, no appellate review will be allowed.

matter be remanded for the factual and legal conclusions of that Court.

2. On August 11, 1997, after oral arguments, the Bankruptcy Court issued its Memorandum Opinion and Order ("August Order"). The Court set forth its factual findings and conclusions of law and awarded the same amount ($535,507.05 in attorney fees) as the previous judge, and this appeal followed.

3. On appeal, a District Court will reject a Bankruptcy Court's findings of fact only if they are clearly erroneous; conclusions of law are reviewed de novo. *Broitman v. Kirkland*, 86 F.3d 172, 174 (10th Cir. 1996). The issue in this case is the amount of attorney fees awarded to Appellant by the Bankruptcy Court. To determine counsel's eligibility for compensation, the court must first find that the fees were "necessary," i.e., that they benefitted the estate or were a required undertaking. *In re Lederman*, 997 F.2d 1321, 1323 (10th Cir. 1993); Bankruptcy Code, 11 U.S.C. § 330(a)(1) (the Court may award fees for "actual, necessary services"). If that answer is no, the inquiry stops. 997 F.2d at 1324. If the answer is yes, then the fees are analyzed to determine if they are "reasonable." Reasonableness turns on the lodestar calculation set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974). 997 F.2d at 1323.

4. The Bankruptcy Court's August Order correctly sets forth the applicable law. The Court also goes through the facts supporting its decision, i.e., which services were actual, necessary, and reasonable; or, on the other hand, which services were not actual or not necessary.

5. I have reviewed the submissions of the parties in this appeal. Appellant's argument is that the Bankruptcy Court's findings of fact were clearly erroneous and the conclusions of law were incorrect. Numerous claimed factual errors are cited, but there is no analysis as to *why* this makes the Bankruptcy Court's decision not supported by substantial evidence. Appellee Angel Projects I, Ltd. makes the point that most of the claimed errors in factual findings are either not in error or are irrelevant to the decision at issue: whether the fees claimed were based on actual, necessary services. And, as Appellee U.S. Trustee points out, Appellant's argument that the legal analysis was improper appears to be based on the mistaken idea that this Court ordered the Bankruptcy Court to apply the lodestar without regard to whether such fees were based on services that were either actual or necessary.

6. Having reviewed the submissions of the parties and portions of the record I agree with Appellees that most of the claimed errors are really attacks on the analysis and conclusions of the Bankruptcy Court, i.e., that most of the claimed services were not actual (i.e., paralegal billing time, mailing expenses) or not necessary (i.e., the Property Owners' Committee's litigation activities).

7. As I pointed out in the PRD, this Court has a limited role in reviewing a Bankruptcy Court's award of attorney fees. The award is discretionary, and to support its award the Bankruptcy Court must set forth its factual findings and legal conclusions. The Bankruptcy Court has done so, and I find that the factual findings are not clearly erroneous and that the legal conclusions are correct.

RECOMMENDED DISPOSITION

I recommend that the appeal be denied and this case dismissed with prejudice.

/s/ RICHARD L. PUGLISI
RICHARD L. PUGLISI
United States Magistrate
Judge

APPENDIX D

UNITED STATES BANKRUPTCY COURT
THE DISTRICT OF NEW MEXICO

No. 11-93-12176 MA

IN RE:
ANGEL FIRE CORPORATION, DEBTOR
TAX I.D. No. 85-0226843

[Filed: Sept. 30, 1993]

ORDER ON MOTION TO EMPLOY COUNSEL FOR THE UNSECURED CREDITORS' COMMITTEE

THIS MATTER having come before the Court on Motion to Employ Counsel for the Property Owners' Committee, filed herein on September 21, 1993, and the Amended Motion filed subsequently, and the Court being satisfied that said law firm, Behles-Giddens, P.A., represents no interest adverse to Debtor or the Estate in the matters upon which it is to be employed, their employment is approved.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Estate is allowed to pay seventy-five percent (75%) of all attorney's fees, as well as one hundred percent (100%) costs and expenses, on a monthly basis, upon receipt by Debtor of statements rendered. The balance of the payment for the billings

shall be applied to the billings upon separate Order of this Court allowing the Attorney's Fee Applications, which Fee Applications will be filed at least every 180 days.

/s/ [*Illegible*]
BANKRUPTCY COURT JUDGE

Supreme Court, U.S.
FILED
AUG - 7 2000
CLERK

(4)

No. 99-1907

IN THE

Supreme Court of the United States

BEHLES-GIDDENS, P.A., now known as
J.D. BEHLES & ASSOCIATES, P.C.,

Petitioner,

v.

ANGEL PROJECT I, LTD. and UNITED STATES TRUSTEE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

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STATEMENT

The Petitioner, Behles-Giddens, disagrees with the Question Presented posed by the Solicitor General. The question is not whether the bankruptcy court erred in disallowing the requested fees as not "actual or necessary" within the meaning of Section 330(a). The primary question of the Petition concerns the plain meaning of Sections 328(a) and 330(a) read in tandem, and the impact that both statutes, not just Section 330(a), have on hourly fee arrangements approved by the bankruptcy court. Behles-Giddens seeks nothing more than to direct the Court's attention to the plain terms of Sections 328(a) and 330(a). Section 328(a) authorizes a committee appointed under section 1102 to employ counsel on any reasonable terms, including "on an hourly basis." *See Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991) (determining the definition of "claim" in 11 U.S.C. § 101(5) is a "straightforward issue of statutory construction to be resolved by reference to the 'text, history, and purpose' of the Bankruptcy Code"). When given a plain reading, Section 330(a)(1), by its own terms, is subject to the terms of Section 328.

Behles-Giddens was employed, with court approval, by the Property Owners Committee ("POC") on an hourly basis. The Sept. 30, 1993 Order on Motion to Employ Counsel specifically refers to "attorney's fees." Angel Fire Br. Opp'n App. 6. The attorney fees to which the bankruptcy court referred were evidenced in "Exhibit A" of Behles-Giddens' Amended Motion to Employ Counsel of Sept. 24, 1993. Angel Fire Br. Opp'n App. 1-4. The exhibit is entitled, "Behles-Giddens, P.A., Hourly Fee Schedule." Angel Fire Br. Opp'n App. 5. Behles-Giddens attorneys performed their work for the POC pursuant to the hourly fee schedule that: (1) was attached to its Amended Motion to Employ Counsel (Angel Fire Br. Opp'n App. 1-4), and that (2) the bankruptcy court used in rendering its decision to allow for Behles-Giddens' employment. Because Behles-Giddens' fees were based on the hourly fee schedule that the bankruptcy court used in its decision to approve the fee agreement, it is

Behles-Giddens' contention that the courts below failed to give any attention whatsoever to the role that Section 328(a) should have had in the awarding of its fees.

Behles-Giddens also disagrees with the argument by the Respondent Angel Fire that "cases under Section 328(a) involve special counsel employed for a specific purpose by the debtor or bankruptcy trustee, not . . . committee counsel." Angel Fire Br. Opp'n 3. This statement is incorrect. Neither the Bankruptcy Code nor the Report of the Senate Committee on the Judiciary on Section 328 (S. REP. No. 95-989, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5825) suggest that Section 328(a) is inapplicable to the type of representation that Behles-Giddens undertook on behalf of the POC. In fact, the very terms of Section 328(a) specifically authorize the employment of committee counsel and a committee may do so on any reasonable terms, including on an hourly basis ("a committee appointed under section 1102 of this title . . . may employ . . . a professional person under section . . . 1103 . . . on any reasonable terms . . . including . . . on an hourly basis, . . ."). If Congress had intended that Section 328(a) apply only to special counsel or to contingent fee arrangements, and not to debtor counsel or committee counsel, it would have said so.

FURTHER REASONS FOR GRANTING THE WRIT

I. THIS CASE INVOLVES AN ORDER TO WHICH SECTION 328(a) APPLIES.

The Petitioner concedes, as the Solicitor General and Angel Fire suggest in their respective Briefs in Opposition, that attorney fee issues often involve fact-intensive determinations and are context-specific. But the few facts necessary in this case are clear. Behles-Giddens' Amended Motion to Employ Counsel (Angel Fire Br. Opp'n App. 1-4) and the attached Exhibit "A" (Angel Fire Br. Opp'n App. 5) specifically referred to Behles-Giddens' "hourly fees." The Sept. 30, 1993, Order on Motion

to Employ Counsel (Angel Fire Br. Opp'n App. 6) specifically allowed the debtor estate to pay "seventy-five (75%) of all attorney's fees." Both Respondents argue that the failure of the Order to specifically mention "Section 328(a)" or "on an hourly basis" is fatal to Behles-Giddens' case and, as such, Section 328(a) does not apply. This argument is incorrect. Neither the Bankruptcy Code nor the legislative intent, as evidenced by the Notes of the Senate Committee on the Judiciary for Section 328 (S. REP. No. 95-989, *supra*, 1978 U.S.C.C.A.N. at 5825), nor the pleading rules of the Rules of Bankruptcy Procedure (Rules 7008 and 9014), require that an employment order include the words "on an hourly basis" or "subject to Section 328(a)."

In the absence of any such requirements, Section 328(a) *does* apply to Behles-Giddens' court-approved, hourly fee arrangement. The conditions of Behles-Giddens employment were approved as required by Section 328(a), which provides for the employment, with the court's approval, of a professional person under Sections 327 and 1103 on any reasonable terms, including on a retainer, *hourly*, or on a contingent fee basis. Notwithstanding the employment order, if the terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions, the court can reduce or increase the fees to compensate for those unanticipated events. Nothing, however, happened later in the instant case that would cause the court to reduce Behles-Giddens' fees. Accordingly, based on a plain reading of Sections 328(a) and 330(a), Behles-Giddens asks this Court to uphold the terms of the Amended Motion to Employ Counsel and the Order thereon.

II. THERE IS A CONFLICT AMONG THE CIRCUITS CONCERNING THE TANDEM USE OF SECTIONS 328(a) AND 330(a).

Behles-Giddens reiterates that there are different holdings among the circuits and bankruptcy courts (Pet. 9-10) concerning

the tandem application of Sections 328(a) and 330(a) — and more specifically what role, if any, Section 328(a) has in the bankruptcy court's decision to award attorney fees. The Solicitor General cites to *Zolfo, Copper & Co. v. Sunbeam-Oster Co.*, 50 F.3d 253, 261 (3d Cir. 1995), for the proposition that where a bankruptcy court's order does not expressly and unambiguously state specific terms and conditions pursuant to the first sentence of Section 328(a), the court is free to apply Section 330(a) "unfettered by the strictures of the second sentence Section 328(a)." U.S. Trustee Br. Opp'n 6. The Fifth Circuit, in *In re National Gypsum,* held that "[I]f prior approval is given to certain compensation, § 328 controls and the court starts with that approved compensation, modifying it only for developments unforeseen when originally approved." *In re National Gypsum Co.*, 123 F.3d 861, 862 (5th Cir. 1997). Similarly, the Ninth Circuit, in *In re Reimers*, held that the bankruptcy court improperly assumed that Section 330 gave the court the power to make a general reasonableness review, despite the express language of Section 328. The Ninth Circuit remanded and required the bankruptcy court below to award compensation to the special counsel applicant consistent with the terms of the contingent fee agreement. *In re Reimers*, 972 F.2d 1127, 1129 (9th Cir. 1992). To extent that the Third Circuit requires "express and unambiguous terms," and that the Fifth Circuit requires mere "prior approval to certain compensation," there *is* a conflict between at least these two circuits concerning the specificity by which a bankruptcy court must enumerate the terms of an employment order. Behles-Giddens contends, *supra*, that neither Section 328(a) nor any other provision of the Bankruptcy Code or the Rules of Bankruptcy Procedure require that an employment order specifically state the terms and conditions, such as "on an hourly basis" or "subject to Section 328(a)." In light of the differing views among the Third, Fifth, and Ninth Circuit Courts of Appeals concerning the specificity of an employment order, Behles-Giddens respectfully asks this Court to clarify just what it is that a bankruptcy court must state when Section 328(a) is involved.

CONCLUSION

The Petitioner respectfully asks the Court to determine how a plain reading of Sections 328(a) and 330(a) should have affected Behles-Giddens' court-approved, hourly fee arrangement. Given a tandem reading of Sections 328(a) and 330(a), Behles-Giddens is, quite frankly, perplexed as to how the courts below can ignore Section 328(a) and construe these fee statutes any other way.

Behles-Giddens respectfully requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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